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In The

Supreme Court of the United States

October Term, 1978

No. 78-820

REPUBLIC STEEL CORPORATION,
Petitioner,

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Republic Steel Corporation ("Republic") petitions that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court below (*"Republic Steel II"*) (App. A, *infra*) is not yet reported. The court of appeals was sitting on remand under this Court's order directing it to reconsider its original opinion (*"Republic Steel I"*) in light of a subsequent statutory amendment. This Court's order is reported at 434 U.S. 1030 (App. C, *infra*). The opinion of the court of appeals in *Republic Steel I* (App. D, *infra*) is reported at 557 F.2d 91. The action of the

Environmental Protection Agency (App. F, *infra*) reviewed by the court of appeals below in *Republic Steel I and II* is not reported.

JURISDICTION

The judgment of the court below was entered on August 21, 1978 (App. B, *infra*). The jurisdiction of this Court is invoked pursuant to U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Water Pollution Control Act, as amended on December 27, 1977, establishes an unconditional, retroactively applicable July 1, 1977, deadline for achieving effluent limitations where those limitations were not administratively defined in time to permit achievement by such date.

2. Whether a person is entitled, as a matter of constitutional right and not merely administrative discretion, to the minimum time necessary to achieve a standard after that standard has been defined where failure to achieve such standard is punishable by substantial daily civil penalties and criminal penalties.

STATUTES INVOLVED

The constitutional and statutory provisions primarily involved are reproduced in Appendix G, *infra*.

STATEMENT

1. Administrative Proceedings In This Case

This case arises out of the action of the Administrator of the United States Environmental Protection Agency ("EPA") in disapproving a National Pollutant Discharge

Elimination System ("NPDES") permit proposed by the Ohio Environmental Protection Agency ("Ohio EPA") for issuance to Republic for its steel-making plant in Canton, Ohio. The Federal Water Pollution Control Act, 33 U.S.C.A. § 1251 *et seq.* (the "Act"), requires that any person, like Republic, which discharges pollutants from a point source into the waters of the United States must possess an NPDES permit and must comply with the terms of that permit or be subject to substantial civil and criminal penalties. *See* Sections 301(a); 402(a),(b); 309(b)-(d); 505.[1] Ohio, like most states, has the responsibility for issuing NPDES permits to dischargers within its boundaries pursuant to a state program approved by EPA. Section 402(b); 39 *Federal Register* 26061 (July 16, 1974). Each NPDES permit issued by the Ohio EPA must comply with any applicable requirement of the Act, and the Ohio EPA must submit each proposed permit prior to issuance to EPA for review. Section 402(b),(d). EPA may disapprove and thereby prevent the issuance of any proposed permit which is "outside of the guidelines and requirements of [the] Act." Section 402(d)(2)(B).

On June 10, 1974, the Ohio EPA issued a draft NPDES permit for the Canton plant.[2] This draft permit established "final" effluent limitations that were to be achieved within 24 months and a schedule of compliance for designing, constructing, and placing into operation whatever treatment facilities were needed to achieve those final limitations (A. 1a-20a).[3] The draft permit did not

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1. Statutory citations are to sections of the Act. The Table of Statutes, *supra*, contains the parallel citations to the United States Code.

2. Republic had filed its application for this permit in 1972.

3. A copy of the appendix in the court below has been lodged with the Clerk of this Court. "A." designates references to that appendix.

specify what treatment facilities were to be installed by Republic. Republic had objections to several provisions in this draft permit and exercised its right under the Ohio NPDES permit program to file a request for an adjudication hearing before the Ohio EPA, and this draft permit never became effective. Ohio Revised Code Section 3745.07 (Page Supp. 1977); Ohio Administrative Code Section 3745-47-05.

Republic and the Ohio EPA then engaged in extensive negotiations which ultimately resolved all but one of Republic's objections. As a result of these negotiations, the final effluent limitations and other permit terms were substantially changed. Agreement on the final effluent limitations and all other terms, except the time for compliance with the final limitations, was reached on August 1, 1975. Despite the fact that a final permit could not then be issued, Republic agreed to proceed with the installation of the pollution-control facilities necessary to achieve the final limitations and agreed that August 1, 1975, would be the starting date for whatever schedule of compliance might ultimately be determined for achieving those limitations (A. 43a-44a).[4] Republic was unable to begin this work prior to August 1, 1975, because the detailed engineering of the facilities to be built could not commence until the final effluent limitations which those facilities had to achieve were determined (A. 51a, 83a-84a, 129a-130a).

An adjudication hearing was held on August 21 and 22 and September 2, 1975, to resolve this issue of the date for achieving the final effluent limitations. The evidence presented at the hearing clearly established that completion of treatment facilities would take 41 months (until January 1, 1979) for one outfall (A. 126a-127a) and

[4] The agreements reached between Republic and the Ohio EPA are contained in A. 21a-39a.

37 months (until September 1, 1978) for another outfall (A. 125a). The evidence also established that each treatment facility and its principal components had to be custom-designed and that detailed engineering could not commence until the final effluent limitations to be achieved were determined, which was not until August 1, 1975 (A. 51a, 83a-84a, 129a-130a).

After the hearing, the Ohio EPA on January 5, 1976, submitted to EPA Region V a proposed permit which required achievement of the agreed-upon final effluent limitations pursuant to the schedule of compliance supported by the hearing record (A. 137a-159a). The hearing record was also submitted to EPA Region V.

By letter of March 30, 1976, EPA Region V disapproved the issuance of the proposed permit (App. F, *infra*). Although EPA Region V did not question the reasonableness of the schedule of compliance, it determined that "the stipulation and proposed permit for Republic Steel Corporation, Canton, Ohio facility, would violate Section 301 of the FWPCA in that the schedule of Compliance for BPT extends beyond July 1, 1977, and for that reason, Region V, USEPA, objects to the issuance of said permit." App. 30a.

The provision of Section 301 upon which EPA's disapproval relies is Section 301(b)(1)(A)(i), which provides in pertinent part:

> . . . there shall be achieved –
>
> (1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available *as defined by the Administrator pursuant to section 304(b) of this Act.* . . . (emphasis added)

EPA disapproved the proposed permit notwithstanding the fact that best practicable control technology currently available ("BPT") had not been defined by the Administrator as expressly required by Section 301. Section 304(b) provides that the Administrator is to define BPT by publishing "regulations, providing guidelines for effluent limitations." The Act requires the Administrator to promulgate these BPT guidelines by October 13, 1973, for 27 industrial categories, including iron and steel manufacturing. *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 704 (CA DC 1974). The Act also provides for the implementation of the requirements of Section 301(b)(1)(A) through the issuance of NPDES permits to individual dischargers, but the Act requires that all dischargers are to be issued their initial NPDES permits no later than December 31, 1974. *Natural Resources Defense Council, Inc.* v. *Train*. 510 F.2d 692, 707 (CA DC 1974). For the Canton plant BPT effluent limitations were not defined by promulgation of guidelines by October 13, 1973, nor by the issuance of a final permit by December 31, 1974. The final effluent limitations for this plant were not determined until August 1, 1975, and it was not possible to build the treatment facilities needed to achieve those limitations by July 1, 1977.

2. Judicial Proceedings In This Case

Republic petitioned the United States Court of Appeals for the Sixth Circuit for review of EPA's disapproval which denied the issuance of the proposed permit to Republic. Section 509. The court of appeals held that Section 301(b)(1)(A) did not require achievement of the final effluent limitations in the proposed permit by July 1, 1977, and remanded the case to EPA. *Republic Steel Corporation* v. *Train*. 557 F.2d 91 (CA6 1977) ("*Republic Steel I*"). The court based its holding primarily

upon the express language of Section 301(b)(1)(A)(i), the statutory framework with its successive statutory deadlines for defining and achieving BPT effluent limitations, and the inequity of imposing unfair consequences on Republic for EPA's administrative shortcomings. App. 19a-20a, 25a. The court's decision in *Republic Steel I* not only rejected EPA's statutory interpretation but also expressed serious reservations as to the constitutional validity of such an interpretation. App. 24a n.17.

EPA petitioned this Court for a writ of certiorari to review *Republic Steel I*. While EPA's petition was pending, the Act was amended on December 27, 1977, by the enactment of Public Law 95-217, 91 Stat. 1566 ("1977 Amendments"). Shortly thereafter, this Court granted the petition and summarily vacated and remanded this case to the court of appeals "for further consideration in light of Public Law 95-217." App. 13a.

On remand, the court of appeals upheld EPA's disapproval of the permit and denied Republic's petition for review. *Republic Steel Corporation* v. *Costle*, No. 76-1557 (August 21, 1978) ("*Republic Steel II*"). The court did not reject the reasoning of *Republic Steel I* but rather concluded that this decision had been "effectively overruled" by the 1977 Amendments. App. 3a. Although the 1977 Amendments did not amend Section 301(b)(1)-(A)(i), the court held that Section 301(b)(1)(A)(i) established "a mandatory and unconditional July 1, 1977, deadline" for achieving PBT effluent limitations. App. 4a. This holding is based upon the addition by the 1977 Amendments of Section 309(a)(5)(B), which authorizes the discretionary issuance by EPA of extensions of the July 1, 1977, deadline. The court construed this new provision as the exclusive avenue of relief from this deadline. App. 4a. The court further held that this statutory change made by the 1977 Amendments with respect to the July 1,

1977, deadline could be retroactively applied to Republic's Canton plant. App. 8a-11a.

REASONS FOR GRANTING THE WRIT

The decision below involves important questions concerning the fundamental pollution control duties of industrial dischargers under the Act and the constitutional rights which protect dischargers against the denial of permits and the threat of sanctions for not achieving deadlines that cannot be achieved because pollution control standards were not established in time.

The holding of the court below that Section 301(b)(1)(A)(i) imposes an unconditional and mandatory July 1, 1977, deadline for dischargers to achieve BPT effluent limitations construes the Act in an unconscionable and unconstitutional manner. Administrative delays in implementing the Act have made it impossible for Republic to install water pollution control facilities by July 1, 1977. These administrative delays and their effect upon Republic are undisputed and are clearly documented in the record in this case; nonetheless, they are virtually ignored in *Republic Steel II*. EPA failed to fulfill its statutory duty to promulgate regulations defining BPT by October 13, 1973. *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 704 (CA DC 1974).[5] Moreover, Republic

[5] There were no regulations applicable to the Canton plant until March 15, 1976, when EPA promulgated "interim final" BPT effluent guidelines limitations regulations for the alloy and stainless steel industry, and these regulations have been vacated and remanded. *American Iron & Steel Institute v. EPA*, 568 F.2d 284 (CA3 1977). These alloy and stainless steel regulations simultaneously established Section 304 guidelines and Section 301 effluent limitations. This simultaneous promulgation has been approved if "the purposes for issuing the guidelines were substantially achieved . . . and no prejudice has been shown." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 131-32 n.22 (1977).

was not issued a final, effective NPDES permit by December 31, 1974, as contemplated by the Act. These failures have deprived Republic of the necessary time for installing treatment facilities before July 1, 1977, since Republic could not commence the detailed engineering of its treatment facilities until the limitations to be achieved were determined. Consequently, Republic could not install these facilities by July 1, 1977, due to these administrative failures and through no fault of its own. These facts are undisputed, as demonstrated by the record in this case and the opinions below.

The holding of the court of appeals that a discharger's duty under Section 301(b)(1)(A)(i) to achieve BPT effluent limitations by July 1, 1977, exists unconditionally has widespread consequences.[6] Hundreds and perhaps thousands of dischargers have not been able to complete treatment facilities by July 1, 1977. EPA failed to meet the October 13, 1973, deadline for promulgating BPT regulations for all 27 industrial categories listed in the Act.[7]

[6] For example, at least three other cases pending in the Sixth Circuit alone raise the question of whether a July 1, 1977, attainment date exists under Section 301(b)(1)(A)(i) where compliance time has been reduced due to administrative inaction and delay. *Cleveland Electric Illuminating Co. v. EPA*, Nos. 77-3085, 77-3160; *Dayton Power & Light Co. v. EPA*, No. 77-3469; and *United States Steel Corp. v. Costle*, No. 76-2674. Decided cases involving a discharger's duty under this section are: *Washington v. EPA*, 573 F.2d 583 (CA9 1978); *United States Steel Corporation v. Train*, 556 F.2d 822 (CA7 1977); *Bethlehem Steel Corporation v. Train*, 544 F.2d 657 (CA3 1976), *certiorari denied sub. nom Bethlehem Steel Corporation v. Quarles*, 430 U.S. 975 (1977). *See also State Water Control Board v. Train*, 559 F.2d 921 (CA4 1977).

[7] Effective BPT regulations still do not exist for some of these industrial categories or segments thereof, including the alloy and stainless steel manufacturing regulations applicable to the Canton plant.

Natural Resources Defense Council, Inc. v. *Train*, 510 F.2d 692 (CA DC 1975). As of September 30, 1976, approximately 12,000 dischargers had not been issued NPDES permits. *Eighth Annual Report of the Council on Environmental Quality* 35 (Dec. 1977).

The problem of lack of defined standards upon the ability to achieve water pollution control deadlines is not limited to the July 1, 1977, deadline. This problem is a continuing one, and it should be resolved now by this Court. The 1977 Amendments provide future deadlines for meeting additional levels of effluent reduction which must be defined by the same types of administrative actions that are involved here. See Section 301(b)(2)(C) (achievement of limitations based on "best available technology economically achieveable" by July 1, 1984, for specified toxic pollutants); Section 301(b)(2)(E) (achievement of limitations based upon "best conventional pollutant control technology" by July 1, 1984); Section 301(b)(2)(F) (achievement of limitations based on "best available technology economically achievable" for non-toxic, non-conventional pollutants within three years of establishment or by July 1, 1984, whichever is later, but not later than July 1, 1987).

The holding that Section 301(b)(1)(A)(i) establishes an unconditional duty to achieve BPT effluent limitations by July 1, 1977, is a clearly erroneous construction which ignores express statutory language. Surely, such a duty cannot exist for a discharger where no administrative action has been taken to define BPT. Since such implementing action is clearly necessary, it must be timely as well. Time is necessary to install wastewater treatment facilities, and it is absurd to fix a discharger's duty to install the best *practicable* control technology *currently available* without considering the time needed. Also, construing the July 1, 1977, BPT deadline to be unconditional renders meaningless the

statutory provisions requiring EPA to take certain actions by specified dates to define BPT as well as the statutory rights given to dischargers to participate in those administrative processes. *See* Section 101(e); *Washington* v. *EPA*, 573 F.2d 583, 590-91 (CA9 1978).

The court below erred in resting its statutory construction of Section 301(b)(1)(A)(i) upon the enactment of 309(a)(5)(B) as part of the 1977 Amendments. Section 309(a)(5)(B) does not alter the statutory scheme for defining BPT, nor does it provide a mechanism for defining BPT.[8] This section only authorizes EPA to grant "an extension of the date referred to in Section 301(b)(1)(A)" to any person in violation of or otherwise not in compliance with "the time requirements under this Act." It thus provides merely an administrative tool that can be used in an enforcement context to extend beyond July 1, 1977, an already established deadline that has been violated.

Section 309(a)(5)(B) is not an effective response to the unfair consequences that a discharger might suffer from EPA's failure to timely promulgate applicable BPT regulations. In reality, Section 309(a)(5)(B) is no relief at all. As the court of appeals notes, an issuance of an extension is discretionary with the Administrator.[9] The court also cites legislative history to the effect that a discharger which has been refused an extension has no right to a

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[8] The 1977 Amendments do not amend the language of any of the statutory provisions construed in *Republic Steel I*, including Section 301(b)(1)(A)(i). It should not be imputed that Congress amends express statutory provisions by such an indirect approach.

[9] "We do not mean to suggest that Republic may in any sense be *entitled* to an extension as a matter of law. The decision on whether or not to grant an extension is committed to the Administrator's discretion, based on his assessment of the factors listed in § 309(a)(5)(B)." App. 11a n.17 (citations omitted).

hearing or appeal.[10] Furthermore, a Section 309(a)(5)(B) extension is not available to any discharger which cannot complete treatment facilities by April 1, 1979. Moreover, EPA has taken the position that the issuance of an extension is not a defense to a suit brought by a citizen pursuant to Section 505 alleging violation of Section 301. 8 *BNA Environment Reporter* 1967, 1972 (April 14, 1978). Thus, even if a discharger were issued an extension, it still would run the risk of citizen suit enforcement actions seeking the imposition of daily civil penalties of $10,000 per day.[11]

The *Republic Steel II* decision overlooks the existence of unjust and unconstitutional consequences arising from the application of its construction of the 1977 Amendments to this case. Although the court of appeals recognized that under the principle of *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974), the 1977 Amendments cannot be applied to this case if doing so would result in manifest injustice, the court applied this principle incorrectly by failing to perceive the adverse consequences for Republic. The court's application of the 1977 Amendments to Republic was in effect the imposition of a retroactive duty that had to be met by July 1, 1977; and the decision exposes Republic to the threat of enforcement action for noncompliance with its permit, notwithstanding the possibility of an extension under Section 309(a)(5)(B). It is manifestly unjust that Republic be placed in this position through no fault of its own and as a consequence of an administrative failure to timely define effluent limitations.

These same consequences also present constitutional difficulties which the Sixth Circuit did not address. Although the Sixth Circuit asserts that Republic could not claim that its noncompliance was induced by an administrative or judicial construction of the Act that the July 1, 1977, deadline was not applicable to its Canton plant, this assertion does not resolve the constitutional issues posed by the court's statutory interpretation. Republic's inability to achieve BPT effluent limitations by July 1, 1977, arises not from any mere inducement but rather from the lack of fair warning as to what effluent limitations it had to achieve. This constitutional right to fair warning exists as a matter of due process of law. *United States* v. *Pennsylvania Industrial Chemical Corporation*, 411 U.S. 655, 673-74 (1973). As applied in this case, the Act also violates due process in that Republic is unreasonably being denied a permit for failure to do what is impossible due to circumstances beyond its control. *See Robinson* v. *California*, 370 U.S. 660 (1962); *Lambert* v. *California*, 355 U.S. 225 (1957).

Similarly, the 1977 Amendments cannot alter Republic's compliance status without violating the *ex post facto* clause which also guarantees a right to fair warning. *Beazell* v. *Ohio*, 269 U.S. 167, 169-70 (1925). The 1977 Amendments passed after July 1, 1977, cannot retroactively establish that date as an unconditional compliance deadline. The possibility of an extension under Section 309(a)(5)(B)

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[10] "Consequently, decisions by the Administrator pursuant to this new provision of law should not be the subject of administrative hearings and appeals but rather, if the Administrator feels he cannot determine that a source meets the requirements of section 309(a)(5)(B), that he will immediately proceed under any of the other enforcement options set out in section 309." App. 5a (citing Senate Report 95-370, 1977 U.S. Code Cong. and Admin. News 4387).

[11] Shortly after the *Republic Steel II* decision, EPA on its own initiative ordered Republic to supply certain information apparently directed toward determining whether the Canton plant is entitled to an extension. Republic supplied this information on October 10, 1978, but EPA has not yet taken any action. Even if EPA were to issue an extension, Republic would not be protected from citizen suits. Conversely, the permit denied Republic would provide such protection. Section 402(k).

does not save the court's construction of the 1977 Amendments, since the *ex post facto* clause looks to the punishment prescribed by the statute rather than to the punishment actually imposed. *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937). The court reasons that the 1977 Amendments in imposing a July 1, 1977, BPT compliance date is not an *ex post facto* law because such a deadline existed under EPA's interpretation of prior law and that this interpretation was an "operative fact" providing fair warning to Republic of the obligation that would be imposed in the future. This reasoning is an unprecedented and unwarranted extension of the operative fact doctrine announced in *Dobbert* v. *Florida*, 432 U.S. 282, 297-98 (1977).[12] The protection against *ex post facto* laws is substantially eroded if a person can be exposed to punishment for an act under a subsequently enacted statute merely because of an administrative agency's construction of a prior statute.

The decision of the Sixth Circuit has created a conflict among the circuits. *Washington* v. *EPA*, 573 F.2d 583, 591 (CA9 1978), holds that EPA has no authority to veto a state NPDES permit in the absence of previously promulgated, applicable BPT guidelines, since the existence of those guidelines "is an explicit precondition for the statutory *requirement* of § 301(b) that effluent reductions be achieved through the application of BPT." The Ninth Circuit construes Section 301(b)(1)(A) in the same

12. In *Dobbert* a death penalty statute in effect at the time a crime was committed but later invalidated as unconstitutional was deemed to be an operative fact as to the penalty for such crime so that the petitioner could be sentenced under an ameliorative, subsequently enacted death penalty statute. In contrast, the 1977 Amendments, as construed by the court of appeals, are not ameliorative; and an EPA statutory interpretation which had been judicially rejected cannot be deemed to be an operative fact as to what position Congress would take in the 1977 Amendments.

manner as the Sixth Circuit had done in *Republic Steel I* and for the same reasons (573 F.2d at 591-92):

> The express language of § 301(b) of the Act does not in terms require the reduction of effluents through the application of BPT no matter how expressed or determined. Rather, it calls for the achievement of "effluent limitations . . . which shall require the application of [BPT] *as defined by the Administrator pursuant to Section 304(b) of this Act.*"
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> * * * *
>
> We accordingly agree with the Court of Appeals for the Sixth Circuit that "[t]he presence within the Act of successive deadlines for promulgation of standards, issuance of permits, and conformance with effluent limitations bespeaks a rational implementation strategy anticipating a discrete sequence of events[.]" *Republic Steel Corp.* v. *Train*, 557 F.2d 91, (6th Cir. 1977). Although Congress intended that dischargers of pollutants be required to achieve effluent reductions applying the best practicable control technology currently available (as indicated by §301(b)(1)(A)), it elected to require that such a result be achieved through a complex administrative mechanism which contemplates the formulation by the Administrator of regulations developed under § 304(b)(1)(A) expressing such effluent limitations as general standards applicable to classes and categories of point sources prior to the transfer of the permitting authority to the states and thus necessarily prior to the Administrator's exercise of the veto power conferred by § 402(d).

The Sixth Circuit's attempts to distinguish the *Washington* case are untenable. Clearly the Ninth Circuit sees no distinction between the two cases, since it applies the reasoning of *Republic Steel I* to the disapproval of the effluent limitations in a permit in the absence of applicable BPT guidelines published by EPA. Furthermore, the Sixth Circuit's assertion that the Ninth Circuit's holding failed to consider the possible impact of the 1977 Amendments only serves to demonstrate another conflict. Although both

cases were decided after the enactment of the 1977 Amendments, the Sixth Circuit's decision views the 1977 Amendments as applicable and dispositive; whereas, the Ninth Circuit's decision does not apply them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 17, 1978

APPENDIX A

No. 76-1557

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

REPUBLIC STEEL CORPORATION, *Petitioner,*

v.

DOUGLAS M. COSTLE, Administrator, U. S. Environmental Protection Agency,

GEORGE R. ALEXANDER, JR., Regional Administrator, U. S. Environmental Protection Agency,

NED E. WILLIAMS, Director, Ohio Environmental Protection Agency, *Respondents.*

ON REMAND from the Supreme Court of the United States.

Decided and Filed August 21, 1978.

Before: CELEBREZZE, LIVELY and KEITH, Circuit Judges.

CELEBREZZE, Circuit Judge. This case is before the Court on remand from the Supreme Court for further consideration in light of the Clean Water Act of 1977, P.L. 95-217. In our previous decision we held that the Administrator of the United States Environmental Protection Agency (EPA) had improperly vetoed issuance of a water pollution permit to petitioner Republic Steel Corporation (Republic) for its Canton, Ohio, mill. *Republic Steel Corp. v. Train*, 557 F.2d 91 (6th Cir. 1977) (hereinafter referred

to as *Republic Steel I*).[1] *Contra, United States Steel Corp.* v. *Train*, 556 F.2d 822, 854-55 (7th Cir. 1977).

The Administrator had objected to the permit, originally proposed by the Ohio Environmental Protection Agency (OEPA), on the ground that it improperly waived a July 1, 1977, statutory deadline for compliance with federal effluent standards. Under § 301(b)(1)(A)(i)[2] of the Federal Water Pollution Control Act as amended in 1972 (FWPCA) industrial dischargers were required to comply "not later than July 1, 1977" with "effluent limitations for point sources [requiring] the application of the best practicable control technology currently available, as defined by the Administrator pursuant to § 304(b)" of the Act. At the time of our previous decision EPA had not yet promulgated final regulations defining "best practicable technology currently available" (BPT) for categories of dischargers including iron and steel manufacturing, de-

[1] The case initially came before us on a petition for review of the Administrator's action, pursuant to § 509(b)(1)(F) of the Federal Water Pollution Act, 33 U.S.C. § 1369(b)(1)(F). The particular action submitted for review was a decision by the Administrator under § 402(d)(2)(B) of the Act to "object to," and thereby veto, issuance of a water pollution permit for the Canton mill as proposed by the Ohio Environmental Protection Agency. We note that the United States Court of Appeals for the Ninth Circuit has since ruled that § 509(b)(1)(F) does not convey jurisdiction on the courts of appeals to review permit vetoes by the Administrator under § 402(d)(2)(B). *Washington* v. *E.P.A.*, 573 F.2d 583, 586-87 (9th Cir. 1978). This Court has already ruled *contra*, however, *Ford Motor Co.* v. *E.P.A.*, 567 F.2d 661, 668 (6th Cir. 1977), and we adhere to our earlier view. *See also Mianus River Preservation Comm.* v. *Administrator, E.P.A.*, 541, F.2d 899, 909 (2d Cir. 1976).

[2] 33 U.S.C. § 1311(b)(1)(A)(i).

spite a requirement in § 304(b)(1)[3] of the Act that such regulations be published by October 18, 1973.[4]

We reluctantly concluded that EPA's failure to timely define BPT precluded the Administrator from imposing a July 1, 1977, compliance deadline, since Congress had apparently established promulgation of regulations under § 304(b) as a necessary precondition for imposition of the deadline in § 301(b)(1)(A)(i). Our decision was designed "to relieve the discharger of the unfair consequences" of being forced to comply with the deadline in the absence of applicable standards for guidance. 557 F.2d at 97.

This Court stayed its mandate in *Republic Steel I* pending the EPA's petition for a writ of certiorari from the Supreme Court. Shortly after EPA filed its petition for certiorari, Congress enacted the Clean Water Act of 1977, which substantially revised FWPCA. In the wake of that enactment, the Supreme Court granted EPA's petition, vacated our judgment in *Republic Steel I*, and remanded the case to this Court for further consideration in light of the new law, *Costle* v. *Republic Steel Corp.*, – U.S. –, 46 U.S.L.W. 3452 (1978).

We have reviewed the 1977 Act and conclude that its provisions have effectively overruled our previous decision. Although neither § 301(b)(1)(A)(i), requiring industrial dischargers to achieve BPT no later than July 1, 1977, nor § 304(b), requiring EPA to define BPT by October 18,

[3] 33 U.S.C. § 1314(b)(1).

[4] As of oral argument in this case (June 1978), EPA had still not promulgated final BPT guidelines for iron and steel manufacturing. In the absence of general standards, BPT has been determined on a case-by-case basis, either by the Administrator or by the responsible state agency. *See, e.g.*, OEPA regulation EP-31-04 (B)(1)(b) (1974).

1973, were amended by the 1977 Act, Congress did add a new § 309(a)(5)(B)[5] providing as follows:

> (B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this Act or in any permit issued under this Act, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 402 of this Act was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 301(b)(1)(A) to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

The legislative history of this provision makes it abundantly clear that Congress intended the procedure outlined therein to be the exclusive avenue of relief from the dictates of a mandatory and unconditional July 1, 1977, deadline. The Senate Report expressly rejected the rationale of *Republic Steel I*:[6]

> Under existing law there are no circumstances that justify a time for compliance extending beyond July 1, 1977. The Administrator can only issue an enforcement order requiring compliance within 30 days or initiate civil or criminal action. Thus, the decision of the U.S. Court of Appeals for the Sixth Circuit in *Republic Steel Corporation* v. *Train* et al and Williams, – F.2d – ,(6th Cir. 1977) was an in-

[5] 33 U.S.C. § 1319(a)(5)(B).

[6] The Senate version of § 309(a)(5)(B) was adopted by the conference committee with only minor revision. H. R. Rep. No. 95-830, 95th Cong. 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 4424, 4463.

> correct interpretation of existing law. This amendment responds to the legitimate concern of dischargers who, despite good faith efforts, will not comply with the 1977 requirements. To accommodate this objective, the committee amended section 309(a) of the Act to authorize the Administrator in his discretion to pursue one of two new options with regard to a discharger out of compliance.
>
> • • •
>
> The committee believes that a case has been made in our hearings on this bill that some relief from penalties must be granted for those sources which have made a good faith attempt to comply with the deadlines in the statute but for justifiable reasons have been unable to do so. The committee considered but rejected the alternative of providing a case-by-case extension of the deadline set out in the statute. That alternative was rejected because the committee felt that such a case-by-case extension would not only burden the administrative process but that it would provide further opportunity for delay for those sources which are otherwise unable to make a legitimate case for additional time. Consequently, decisions by the Administrator pursuant to this new provision of law should not be the subject of administrative hearings and appeals but rather, if the Administrator feels he cannot determine that a source meets the requirements of section 309(a)(5)(B) that he will immediately proceed under any of the other enforcement options set out in section 309. This authorization of limited flexibility granted to the Administrator will maintain the pressure for compliance while at the same time enabling the Administrator to use his discretion to grant any justifiable extension.
>
> Sen. Rep. 95-370, 95th Cong., 1st Sess. reprinted in 1977 U.S. Code Cong. & Admin. News 4326, 4385, 4387.

The import of the statute is now plain: the July 1, 1977, deadline cannot be waived by the courts. To the extent that noncompliance occurs despite good faith efforts as defined in § 309(a)(5)(B), relief is available only via

discretionary extension of the deadline by the Administrator.[7]

Republic urges that mere addition of a new remedial procedure does not change the operation of the rest of the Act as we construed it in *Republic Steel I*. We are bound, however, to read the amendment together with the original provisions of the Act "as parts of an integrated whole." *Markham* v. *Cabell*, 326 U.S. 404, 411 (1945). The unchanged sections and the amendment must generally be given "the most harmonious, comprehensive meaning possible" so that they do not conflict. *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947). *See also* 1A Sutherland, Statutory Construction § 22.35 (1972). To insist on adherence to our earlier view would not only render § 309(a)(5)(B) largely meaningless, but also would defeat Congress' clearly expressed intent in enacting that section.

Moreover, the 1977 Act effectively responds to the concern we expressed in *Republic Steel I* that a discharger might suffer "unfair consequences" from EPA's failure to timely promulgate relevant BPT regulations. Under prior law, the Administrator had no clear statutory authority to extend the July 1, 1977, deadline and a discharger could be subjected to liability without any consideration for the reasons for his noncompliance.[8] The new § 309(a)-(5)(B) clearly permits the Administrator to extend the

[7] OEPA, which supported Republic's petition in *Republic Steel I*, now takes the position that the 1977 Act requires that we uphold EPA's position.

[8] Prior to the 1977 Act, EPA did provide relief from the 1977 deadline on an informal basis. Under the "Enforcement Compliance Schedule Letter" (ECSL) program, the Administrator would agree to refrain from enforcement of the statutory deadline against certain dischargers who made good faith attempts at compliance. *See Bethlehem Steel Corp.* v. *Train*, 544 F.2d 657, 659-60 (3d Cir. 1976), *cert. den.*, 430 U.S. 975 (1977).

deadline where noncompliance was caused solely by the lack of BPT guidelines.[9]

We conclude, then, that the Administrator can properly object under § 402(d)(2)(B) of the Act to a proposed permit for a point source governed by § 301(b)-(1)(A)(i) if that permit does not require attainment of BPT by July 1, 1977, unless the Administrator has deter-

[9] The Senate Report indicates that § 309(a)(5)(B) was directed, in part, at dischargers whose noncompliance was caused by their inability to ascertain applicable standards, despite good faith attempts:

> The limited discretion granted to the Administrator by section 309(a)(5)(B) may only be exercised where the Administrator is able to determine that a discharger acted in good faith. The term "good faith" is generally understood to mean a reasonable attempt to comply with the mandates of law. *Did the discharger attempt to determine what the applicable requirements were?* When the required technology was generally known in the industry, but the discharger had some legitimate disagreements with the Agency on other points, did the discharger begin on an abatement program or conversely did the discharger delay the abatement program pending the outcome of lengthy administrative procedures? When the required technology was the subject of a legitimate dispute with the Agency, did the discharger take all other measures that it was capable f (such as segregating waste streams, necessary site preparation, and outfall construction) or did it delay these practices pending the outcome of lengthy administrative procedures?

S. Rep. 95-370, 95th Cong., 1st Session, 1977 U.S. Code Cong. & Admin. News 4326, 4386 (emphasis supplied).

The Ninth Circuit recently held that the Administrator could not veto a proposed permit for failure to require attainment of BPT by the discharger, where the Administrator had not yet promulgated applicable BPT guidelines. *Washington* v. *EPA*, 573 F.2d 583, 589-92 (9th Cir. 1978). The case is distinguishable in that here the Administrator did not object to the substantive effluent limitations in the proposed permit for the Canton mill – the objection related solely to the compliance schedule. In any event, the Ninth Circuit holding failed to consider the possible impact of the 1977 Act on the Administrator's veto power under § 402(d)(2)(B).

mined that a time extension is warranted pursuant to § 309(a)(5)(B).

This does not, however, end our inquiry. We must decide whether the 1977 Act may be applied in the context of this case, which was pending before the Supreme Court at the time the new law took effect.

The general rule is that "a court is to apply the law in effect at the time of its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974). This principle applies with full force to an appellate court in reconsidering a decision that has been vacated and remanded by the Supreme Court in light of an intervening change in the law. *See Fruehauf Corp.* v. *Internal Revenue Service*, 566 F.2d 574, 577-79 (6th Cir. 1977).

The Clean Water Act of 1977 contains no "statutory direction or legislative history" militating against application of § 309(a)(5)(B) to pending cases.[10] To the contrary, the statute is applicable to "any person who *is* a violator of, or any person who *is* otherwise not in compliance with the time requirements" of the Act. § 309(a)-(5)(B) (emphasis supplied). Moreover, the Senate Report indicates that the § 309 procedure was intended to

[10] The conference report contains language regarding "existing administrative and court orders":

> It is the intent of the conferees that under the provision which allows the Administrator to establish a reasonable time in which to comply with an enforcement order, existing administrative and court orders which provide for attainment dates beyond April 1, 1979, continue in effect unless modified under these amendments. Therefore, the existing enforcement policy of the EPA is continued.

H. R. Rep. No. 95-830, 95th Cong., 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4424, 4464.

This language has no application to the instant case, since there are no "existing" administrative or court orders providing for attainment dates beyond April 1, 1979, for the Canton mill.

"codify" the informal EPA practice already in existence, under which the Administrator stood firm behind the 1977 deadline, but delayed enforcement where the discharger showed the requisite good faith efforts at compliance.[11] *See* Sen. Rep. No. 95-370, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 4326, 4386. The Conference Report likewise indicates that under the 1977 Act "the existing enforcement policy of the EPA is continued." H. R. Rep. No. 95-830, 95th Cong., 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4424, 4464.

Nor do we think that application of current law would result in manifest injustice. If Republic has made good faith efforts at compliance with the law that have been delayed only by EPA's failure to timely promulgate BPT standards, then the company will be eligible for an extension under § 309(a)(5)(B).[12] There is nothing fundamentally unfair in predicating relief from the deadline on a showing to the responsible agency that the polluter has made a "reasonable attempt to comply with the mandates of the law." Sen. Rep. 95-370, 95th Cong., 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4326, 4386. Indeed, to require anything less would work an injustice on the overwhelming majority of the nation's major industrial dischargers who followed the law as best they could and met the statutory timetable.[13] It would

[11] *See* note 8, *supra*.

[12] We assume, as we must, that the Administrator will make the necessary determination with regularity and fairness. *See United States* v. *Morgan*, 313 U.S. 409, 421 (1941); *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926); K. C. Davis, Administrative Law Treatise § 11.06. *Cf. Withrow* v. *Larkin*, 421 U.S. 35, 47, 55 (1975).

[13] According to the Senate Report, ninety percent of the nation's major industrial dischargers were expected to meet the 1977 deadline. Sen. Rep. No. 95-370, 95th Cong. 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4326, 4333.

also flaunt the national commitment to attainment of water quality capable of supporting fish, wildlife and recreation by 1983, and the total elimination of pollutant discharges by 1985. 33 U.S.C. § 1251(a)(1) & (2). Application of current law is particularly favored where such matters of great national concern are at stake. *Bradley, supra,* 416 U.S. at 719-20.

The situation might be different if Republic could claim that its noncompliance was induced by administrative or judicial construction of § 301(b)(1)(A)(i) to the effect that the July 1, 1977, deadline was waived by EPA's failure to promulgate BPT guidelines. *See generally United States* v. *Pennsylvania Ind. Chem. Corp.*, 411 U.S. 655, 670-75 (1973). But in the years following enactment of FWPCA, EPA consistently took the official position that the statutory compliance date was absolute and that it was not waived by the absence of BPT guidelines.[14] The first draft permit for the Canton mill issued by OEPA in June 1974 required compliance by September 1976. EPA's position as to the Act's time requirement was not challenged by a court of appeals until our decision in *Republic Steel I* on June 23, 1977 – only days before the July 1, 1977, dead-

[14] *See, e.g.,* United States Environmental Protection Agency, Decision of the General Counsel #4, in 1 DECISIONS OF THE ADMINISTRATOR AND DECISIONS OF THE GENERAL COUNSEL [hereinafter "DGC"] 177, 181 (4-4-75), *aff'd,* Decision of the Administrator #75-5, 1 DGC 136, 144 (12-5-75); Decision of the General Counsel #11, 1 DGC 209, 210-11 (5-7-75); Decision of the General Counsel #23, 1 DGC 305, 314 (7-3-75); Decision of the General Counsel #26, 1 DGC 327, 328, 330-31 (7-24-75), *aff'd,* Decision of the Administrator #75-9, 1 DGC 106, 108-09 (9-30-75); Decision of the General Counsel #45, 2 DGC, 230, 232-36, *aff'd,* Decision of the Administrator #75-10, 2 DGC 27 (8-10-76).

See also United States Steel Corp. v. *Train,* 556 F.2d 822, 853-55 (7th Cir. 1977); *Bethlehem Steel Corp.* v. *Train,* 544 F. 2d 657, 660 (3d Cir. 1976); 40 C.F.R. § 125.11(c) (promulgated 5-22-73).

line.[15] Republic can hardly claim that its noncompliance was induced by that decision, since by even the most conservative estimates the necessary equipment would take many months to construct.[16] Nor can the company maintain that it ever had a vested right in the result ordered in *Republic Steel I,* since our mandate there never took effect, and since the Supreme Court later vacated the judgment altogether. *Cf. Bradley, supra,* 416 U.S. at 720.

In any event, Republic does not seriously claim that its noncompliance with the July 1, 1977, deadline is the result of an honest belief that the deadline was invalid. Rather the company maintains that it was unable to meet the deadline, despite good faith efforts, because of the absence of BPT guidelines from EPA. If this is true, then the new § 309(a)(5)(B) procedure can provide any justified relief.[17]

The petition for review is dismissed.

[15] Similar considerations would preclude any possible applicability of the ex post facto clause to this case. The existence of the July 1, 1977, deadline, as construed by EPA was an "operative fact" sufficient to provide fair warning to Republic. *Dobbert* v. *Florida,* 432 U.S. 282, 297-98 (1977).

[16] The same rationale precludes any claim that noncompliance with the deadline was induced by OEPA's agreement to a 42 month compliance schedule in the fall of 1975. Republic concedes that its duty to commence compliance measures attached prior to that agreement. *See Republic Steel I,* 557 F.2d at 94.

[17] We do not mean to suggest that Republic may in any sense be *entitled* to an extension as a matter of law. The decision on whether or not to grant an extension is committed to the Administrator's discretion, based on his assessment of the factors listed in § 309(a)(5)(B). Sen. Rep. 95-370, 95th Cong., 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4326, 4386-87. *See Quarles, Impact of the 1977 Clean Water Act Amendments on Industrial Dischargers,* ENV. REP. MONOGRAPH No. 25 at 2 (1978). *See generally Vermont Yankee Nuclear Power Corp.* v. *NRDC,* — U.S. —, 46 U.S.L.W. 4301 (1978).

APPENDIX B

No. 76-1557

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

[Filed August 21, 1978]

REPUBLIC STEEL CORPORATION,
Petitioner,
v.

DOUGLAS M. COSTLE, Administrator, U. S. Environmental Protection Agency,

GEORGE R. ALEXANDER, JR., Regional Administrator, U. S. Environmental Protection Agency,

NED E. WILLIAMS, Director, Ohio Environmental Protection Agency,
Respondents.

} ORDER

Before: CELEBREZZE, LIVELY and KEITH, Circuit Judges.

Pursuant to the mandate of the Supreme Court of the United States, and upon consideration of the further briefs and oral argument of counsel,

It is ordered that the petition to review an order of the Environmental Protection Agency be and it is hereby dismissed.

Each party will bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT.
John P. Hehman, Clerk

/s/ BY: GRACE KELLY
Chief Deputy Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 16, 1978

EBEN H. COCKLEY, ESQ.
Jones, Day, Reavis & Pogue
1700 Union Commerce Bldg.
Cleveland, Ohio 44115

RE: Douglas M. Costle, Administrator,
Environmental Protection Agency, et al.
v. Republic Steel Corporation, et al.
No. 77-631

Dear Mr. Cockley:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Public Law 95-217.

Very truly yours,
MICHAEL RODAK, JR., Clerk

/s/ Lawrence P. Gill
Deputy

APPENDIX D

No. 76-1557

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

REPUBLIC STEEL CORPORATION, *Petitioner,*

v.

RUSSELL E. TRAIN, Administrator, U. S. Environmental Protection Agency,

GEORGE R. ALEXANDER, JR., Regional Administrator, U. S. Environmental Protection Agency,

and

NED E. WILLIAMS, Director, Ohio Environmental Protection Agency, *Respondents.*

PETITION to review action of the Administrator of the United States Environmental Protection Agency

Decided and Filed June 23, 1977.

Before: CELEBREZZE and LIVELY, Circuit Judges, and RUBIN,* District Judge.

CELEBREZZE, Circuit Judge. This case of first impression arises under the 1972 amendments to the Federal Water Pollution Control Act, P.L. 92-500.[1] The question presented is whether failure of the Administrator of the United States Environmental Protection Agency (EPA)

* The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

[1] 33 U.S.C. § 1251 *et seq.* (Supp. III 1973).

to define interim effluent limitations reflecting a given level of pollution control technology, as required by the Act, frees an authorized state agency to issue a discharge permit which sanctions noncompliance with the statutory deadline for achieving that degree of effluent abatement.

The law in the case consists of three interdependent provisions of the Act which are at the crux of the regulatory scheme to control point sources of water pollution. Section 301(b)[2] defines an inflexible schedule for achieving two interim levels of effluent abatement in furtherance of "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." Section 101(a)(1). Key to this litigation is the subsection 301(b)(1)(A)(i) requirement of conformity by July 1, 1977 with "effluent limitations for point sources * * * which shall require the application of the best practicable control technology currently available [BPT] as defined by the Administrator pursuant to section [304(b)] of [the Act] * * *." Section 304(b)(1),[3] in turn, obligates the Administrator to publish by October 18, 1973, regulations establishing effluent guidelines reflecting BPT for categories of dischargers including iron and steel manufacturing. See section 306(b)(1)(A).[4]

Pollution control standards promulgated pursuant to sections 301 and 304 are implemented nationally through a decentralized permit granting mechanism defined in section 402[5] as the National Pollutant Discharge Elimination System (NPDES). Subsection 402(a)(1) empowers EPA in the normal course to issue permits which impose in-

[2] 33 U.S.C. § 1311(b).

[3] 33 U.S.C. § 1314(b)(1).

[4] 33 U.S.C. § 1316(b)(1)(A) lists the minimum industry categories of pollution sources for which regulations must be promulgated.

[5] 33 U.S.C. § 1342.

dustry-wide effluent limitations which it has already defined. In addition, EPA may define these limitations on a case by case basis "prior to the taking of necessary implementing actions relating to all such requirements" (i.e., while rule making is still in progress). *Id.*

Subsection 402(b) directs the Administrator to delegate permit granting authority to states which have proposed self-regulatory programs which are operationally compatible with uniform administration of the Act. To ensure that qualifying state environmental agencies apply effluent limitations even-handedly, subsection 402(d)(2)(B) empowers the Administrator to block issuance of any proposed NPDES permit which he deems to be "outside the guidelines and requirements of [the Act]." *Id.* Whether federal or state in origin, all NPDES permits must ensure compliance with "applicable requirements" of six enumerated provisions of the Act including section 301. In addition, all permits must issue on or before December 31, 1974, pursuant to subsection 402(k).[6]

In July, 1972, Republic Steel Corporation (Republic) applied for a federal permit to continue discharging effluents from its Canton, Ohio steel mill into Nimishillen Creek. The Canton mill is an integrated steel manufacturing operation engaged primarily in the processing of alloy and stainless steel. In March, 1974, Ohio received approval from EPA under section 402(b) to begin issuing NPDES permits, and Republic immediately commenced to negotiate with the Ohio Environmental Protection Agency (Ohio EPA).

[6] This deadline is not expressly mandated by the Act, but may be inferred from the fact that 33 U.S.C. § 1342(k) states that continuation of effluent discharge without a permit after December 31, 1974 will violate the Act unless a permit application is pending and disposition has been delayed for reasons other than the discharger's own negligence. *See Natural Resources Defense Council, Inc.* v. *Train*, 510 F. 2d 692, 707 (D.C. Cir. 1975).

In June, 1974, Ohio EPA issued a draft permit[7] for the Canton mill which incorporated *state defined* effluent limitations under state estimates of BPT. The permit provided for a 24 month compliance schedule compatible with the Act's July 1, 1977 interim implementation deadline. At that time EPA had failed to promulgate any section 304(b) effluent limitation guidelines for iron and steel manufacturing.[8] As of the present date no final regulations exist covering alloy and stainless steel operation.[9]

Understandably, in the absence of controlling federal regulations, Republic sought to exploit available state administrative procedures to secure the most favorable permit terms and conditions. Prolonged hearings and negotiations with Ohio EPA resulted in redefinition of the originally proposed effluent limitations. On August 1, 1975, eight months after the last date envisioned by Congress for routine issuance of NPDES permits, final agreement was reached and the implementation period commenced to run. However, Republic continued to assert that full compliance within 24 months was physically impossible.[10] This prompted further adjudication hearings at which Republic presented unchallenged engineering and procure-

[7] NPDES permit No. D 300*AD.

[8] Regulations defining BPT effluent limitations for primary operations in carbon steel manufacturing were promulgated in 39 *Fed. Reg.* 24114 (June 28, 1974). However, these regulations were subsequently remanded in their entirety to the Administrator for revision in accordance with the decision in *American Iron and Steel Institute* v. *EPA*, 526 F. 2d 1027 (3rd Cir. 1975). As of the date of oral argument in the instant case, no revised regulations had been promulgated.

[9] "Interim final" guidelines covering alloy and stainless steel operations were published in 41 *Fed. Reg.* 12990 (March 29, 1976).

[10] Had Republic's permit been issued before the statutory deadline mandated by 33 U.S.C. § 1342(k), the company would have had 30 months to achieve BPT effluent levels.

ment data which convinced Ohio EPA to modify the permit to allow 42 months for development and installation of antipollution devices. Ohio EPA was aware that this change extended compliance beyond the July 1, 1977, date imposed by section 301(b)(1)(A)(i). However, the state administrator believed that the special circumstances of the case legally justified this deviation.

In January, 1976, Ohio EPA transmitted the final NPDES permit to EPA's Region V office as required by section 402(d)(1). Within 90 days the Director of the Enforcement Division of Region V objected to its issuance, exercising his authority under section 402(d)(2)(B). He did not expressly question the reasonableness of the state's BPT effluent standards or the 42 month implementation schedule. Rather, he concluded that the permit violated section 301 because full compliance would not be achieved until after July 1, 1977. Republic filed a timely petition for judicial review, pursuant to section 509(b)(1)(F),[11] challenging this determination.

We do not question EPA's good faith in attempting to discharge the ambitious and often ambiguous duties imposed upon it by a "poorly drafted and astonishingly imprecise statute." *E.I. du Pont de Nemours & Company* v. *Train*, 541 F.2d 1018, 1026 (4th Cir. 1976). Many factors, some admittedly beyond EPA's control, have conspired to frustrate its legitimate compliance efforts. In particular, virtually every exercise of the agency's discretion has precipitated protracted litigation challenging the legitimacy of its authority or the substance of its "final" regulations. *See American Petroleum Institute* v. *Environmental Protection Agency*, 540 F.2d 1023, 1027 (10th Cir. 1976) (thirteen relevant cases cited).

The fact remains, however, that the imperative nature of EPA's rule making responsibilities under the Act has

[11] 33 U.S.C. § 1369(b)(1)(F).

been confirmed through litigation. In 1975, the United States Court of Appeals for the District of Columbia affirmed the authority of a federal district court to compel the agency to adhere to a remedial court imposed timetable for the publication of guidelines for all point source effluent discharges. *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692 (D.C. Cir. 1975). Unfortunately, judicial intervention did not avert the regrettable situation which confronts us here. The inability of EPA to meet its statutory obligations has distorted the regulatory scheme and imposed additional burdens which must be equitably distributed. This task is a difficult one because of the nature of the available options. Either the affected discharger must be compelled to risk potential enforcement proceedings in spite of an abbreviated compliance schedule, or society must tolerate slippage of an interim pollution abatement deadline.

Republic contends that the language of section 301(b)(1)(A)(i) expressly conditions adherence to the July 1, 1977, deadline upon definition *by the Administrator* of BPT effluent limitations and guidelines *pursuant to section 304(b) of the Act*. Therefore, the Administrator's failure to satisfy this condition precedent by publishing final regulations for alloy and stainless steel manufacturing excuses Republic's noncompliance with the July 1 date. We reluctantly agree. The import of the section is unequivocal: federal regulations must exist before dischargers can be compelled to honor dates for implementing them. *See United States* v. *GAF Corporation*, 389 F. Supp. 1379, 1386 (S.D. Tex. 1975). The presence within the Act of successive deadlines for promulgation of standards, issuance of permits, and conformance with effluent limitations bespeaks a rational implementation strategy anticipating a discrete sequence of events:

> The Act's text and its legislative history make clear that as a general matter the section 304(b)(1) guide-

> lines and the section 301(b)(1) limitations were to be developed prior to the issuance of permits. Sections 402(a) and 402(b) require that permits issued by the Administrator and by the states assure compliance with the effluent limitations of section 301. The Senate Report confirms the interdependence of the three provisions. That report states that "[s]ubsection (b) of this section [304] requires the Administrator, within one year after enactment, to publish guidelines for setting effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under section 402." Another portion of the Senate Report indicates that at least 30 months lead time is required to afford industries an opportunity to complete construction and modifications necessary to comply with the phase one effluent limitation deadline. Under the final version of the Act effluent limitations and permits would be required by December 31, 1974, in order to provide polluters 30 months to comply with the July 1, 1977, deadline.

Natural Resources Defense Council, Inc. v. *Train*, 510 F.2d 692, 707-708 (D.C. Cir. 1975) (footnotes omitted).

The crucial role of federal rule making in achieving meaningful pollution control on a national scale is revealed by the Third Circuit's analysis in *American Iron and Steel Institute* v. *EPA*:

> [W]e reconcile sections 301 and 304 in the following manner: the section 301 limitations represent both the base level or minimum degree of effluent *control* permissible and the ceiling (or maximum amount of effluent discharge) permissible nationwide within a given category, and the section 304 guidelines are intended to provide precise guidance to the permit-issuing authorities in establishing a permissible level of discharge that is *more stringent than the ceiling*.

526 F. 2d, 1027, 1045 (3rd Cir. 1975). (emphasis added). If no federal standards exist, *any* state limitation on discharge, no matter how insignificant, become more stringent than nonexistent ceilings imposed by the Act. *See* section 301(b)(1)(C). Surely Congress did not intend for the Act to be construed to foster token, *ad hoc*, clean up efforts which would inevitably defeat achievement of the goal of zero pollution by 1985.[12]

EPA answers Republic's argument by exhorting us to accept the "plain meaning" of section 301(b)(1)(A). The agency contends that the language of the section admits to no other interpretation than that July 1, 1977 is to be a "uniform deadline on all industrial dischargers, * * * plain, unequivocal and mandatory." Unfortunately, EPA's argument is persuasive only if we accept an expurgated version of the section which omits reference to the duty owed by the Administrator to publish regulations by a fixed date.

EPA correctly points out that the Act is devoid of language countenancing exceptions to the July 1, 1977, deadline under any condition. The Act's legislative history is replete with statements attesting to the inflexible nature of the administrative timetable.[13] In addition, Congress rejected a provision in the House version of the measure which would have allowed dischargers a discretionary extension of time in the face of impending noncompliance

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[12] The Director of Ohio EPA, a respondent in the case whose position is aligned with that of Republic, argues that he issued Republic's NPDES permit under the authority of 33 U.S.C. § 1311 (b) (1) (C) which allows states to impose more stringent limitations than those applicable under the Act. If we follow this strained rationale, we would have to approve any state permit which authorized dischargers to maintain current effluent levels because *any* standard is more stringent than a nonexistent federal ceiling. This we refuse to do because it would be inimical to achieving meaningful pollution abatement on a national scale.

[13] For a comprehensive review of this legislative history, see *Bethlehem Steel Corporation* v. *Train*, 544 F. 2d 657, 661-662 (3rd Cir. 1976).

due to physical or legal impossibility.[14] Nevertheless, nothing cited to us by EPA suggests that Congress anticipated the "Catch 22" situation inherent in the facts of this case. The language of the Act and its legislative history make clear that Congress expected EPA to define the rules before subjecting dischargers to potential civil and criminal penalties. *Natural Resources Defense Council, Inc.* v. *Train, supra.*

EPA attempts to bolster its position by emphasizing its authority under section 402(a)(1), in advance of formally promulgated regulations, to issue and enforce NPDES permits imposing "such conditions as the Administrator determines are necessary to carry out the provisions of the Act." *Id.* From this, it would have us conclude that the duty of the discharger to achieve BPT by July 1, 1977 must be independent of EPA's obligation to promulgate the necessary guidelines by October 18, 1973. EPA cites *Bethlehem Steel Corporation* v. *Train,* 544 F. 2d 657 (3rd Cir. 1976), and *United States* v. *Cutter Laboratories, Inc.,* 413 F. Supp. 1295 (E.D. Tenn. 1976), in support of this position.[15]

A careful reading of both opinions confirms that EPA's reliance upon them is misplaced. The Third Circuit correctly categorizes EPA's authority under section 402

[14] See proposed section 301(b)(3). *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93rd Cong. 965 (Jan. 1973).

[15] EPA also draws our attention to *State Water Control Board* v. *Train,* 8 E.R.C. 1609 (E.D. Va., 1976) which upheld the inflexibility of a different section 301 deadline where noncompliance was due to the failure of Congress to appropriate sufficient money for public works (in this case, the construction of municipal sewage treatment plants). This case is readily distinguished from the present situation where noncompliance is linked to derelection by EPA of duties imposed by the Act itself as a condition precedent to compliance.

(a)(1) to issue NPDES permits on a case by case basis as a *temporary* expedient to ensure immediate progress during the year of rule making contemplated by section 402(b):

> As a result [of the nonexistence of section 304 and 301 guidelines and limitations for iron and steel manufacturing as of the date of the opinion], permits have been issued to iron and steel manufacturers under a clause of section 402(a)(1) that empowers the EPA to grant permits, *on an interim basis,* before formal guidelines are promulgated.

Bethlehem Steel Corporation v. *Train,* 544 F. 2d at 659 (emphasis added). In the *Bethlehem Steel* case EPA granted the permit on December 31, 1974, the last day mandated by Congress for routine issuance of NPDES permits. Therefore, Bethlehem Steel enjoyed a 30 month compliance schedule, the minimum period possible under the statutory scheme assuming no administrative slippage. In contrast, Republic's permit was issued by a state agency eight months after the expiration of the permit granting deadline, affording Republic only 24 months for compliance. This factual difference was not overlooked by the Third Circuit which carefully excludes Republic's situation from the purview of its holding in the *Bethlehem Steel* case.[16]

We read the *Bethlehem Steel* and *Cutter Laboratory* decisions as standing for the limited proposition that a July 1, 1977, deadline, written into an NPDES permit *issued by EPA on or before December 31, 1974,* is enforceable despite the absence of BPT federal guidelines. Although we may

[16] *See* 544 F. 2d at 660 n. 20. Republic appeared as *amicus curiae* in that case on behalf of Bethlehem Steel. *United States Steel Corporation* v. *Train,* Nos. 76-1425 and 76-1616 (7th Cir. May 13, 1977), a case in which EPA issued the NPDES permit in October, 1974, while Federal BPT standards existed for iron and carbon steel manufacturing, is distinguishable from our decision here on the same ground.

share his view, we find no pursuasive authority for extending its application to permits issued by EPA after 1974.[17] In addition, we are convinced that the Act expressly forecloses this result when the permit issuing authority is a state agency. Section 302(1)(A) empowers states to issue NPDES permits which supply, and insure compliance with, any applicable requirements of sections 301, * * * of [the Act]." *Id.* Our holding that section 301(b)(1)(A)(i) is made unenforceable by the Administrator's failure to promulgate necessary regulations is tantamount to a finding that the July 1, 1977, deadline is no longer an "applicable requirement" of the Act. Therefore, in this case, Ohio EPA was not bound to apply it and EPA was without authority to object to the proposed permit on this ground.[18]

EPA's final contention is that it complied with the rule making requirements of section 304(b) by implicitly ratifying the effluent limitations defined by Ohio EPA. EPA ignores the actual language of section 301(b)(1)(A)(i) which demands that BPT guidelines be promulgated pursuant to the procedure set forth in section 304(b). Ohio EPA did not follow that procedure for the obvious reason that section 304(b) is exclusively addressed to the Administrator of EPA. We reject the notion that state acts can be federalized *sub silentio* by the mere acquiescence of an administrative agency in the absence of clear statutory provisions to that effect.

[17] The difficulty is dramatized by a hypothetical case in which EPA issues an NPDES permit in 1977 requiring compliance with the July 1977 completion date. Under such circumstances compliance may well be foreclosed by constitutional objections. *See United States Steel Corporation* v. *Train*, Nos. 76-1425 and 76-1616, at 51 (7th Cir. May 13, 1977).

[18] We expressly exclude from our holding situations in which state agencies may have issued NPDES permits in the absence of federal guidelines prior to December 31, 1974.

Republic urges us to remand the case to EPA with directions that the agency unconditionally approve immediate issuance of Republic's NPDES permit in its original form. However, the record suggests a more appropriate remedy. If we assume that the Administrator satsifactorily performed all the tasks incumbent upon him under section 301 and 304, Republic could not have received its permit any earlier than September 1, 1974.[19] This would have afforded no more than 34 months to achieve final BPT effluent limitations. The actual permit provides 42 months, eight more than Republic would have been entitled to had there been no distortion of the Act's timetable. Our disposition of this case is intended to relieve the discharger of the unfair consequences flowing from EPA's administrative shortcomings. It is not intended to bestow special benefits not enjoyed by other permittees.

EPA is not foreclosed from objecting to Republic's permit on grounds other than the termination date of its compliance schedule. Under the special circumstances of this case, we believe that EPA must be granted a second opportunity to scrutinize the balance of the permit for consistency with the Act.[20] Perhaps the inherent reasonableness of the proposed 42 month period is amenable to administrative review under existing regulations or sections other than 301. That is for EPA to determine in the first instance.

To guard against the possibility that situations such as this will prompt state agencies to propose extravagant compliance schedules, we remand the case to EPA with direc-

[19] This date approximately reflects the date upon which Republic's permit was first issued by Ohio EPA (prior to extensive renegotiations and modification of terms) plus the maximum period reserved for the filing of objections by EPA.

[20] The obviousness of the permit's putative section 301 violation may have prompted EPA to bypass an exhaustive review of its other substantive provisions.

tions that the agency acquiesce to issuance by Ohio EPA of Republic's NPDES permit unless, within 30 days, it specifies pursuasive new grounds for objection under section 402(d)(2)(B).

Remanded.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 76-1557

[Filed June 23, 1977]

REPUBLIC STEEL CORPORATION, PETITIONER

v.

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency,

GEORGE R. ALEXANDER, JR. Regional Administrator, United States Environmental Protection Agency,

and

NED E. WILLIAMS, Director, Ohio Environmental Protection Agency, RESPONDENTS

Before: CELEBREZZE and LIVELY, Circuit Judges, and RUBIN, District Judge.

On petition to review an action of the Administrator of the United States Environmental Protection Agency,

This cause came on to be heard on the brief and record of proceedings before the Environmental Protection Agency and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the case be and it is hereby remanded to the Environmental Protection Agency with directions.

Each party will bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

APPENDIX F

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

Region V

230 South Dearborn St.
Chicago, Illinois 60604
Mar. 30, 1976

Mr. Ned Williams, Director
Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, Ohio 43216

RE: Republic Steel Corporation
Canton, Ohio Facility
OEPA Permit No. D 300°AD

Dear Mr. Williams:

On January 5, 1976, the Ohio Environmental Protection Agency (OEPA) submitted for United States Environmental Protection Agency (USEPA) consideration pursuant to § 402(d) of the Federal Water Pollution Control Act, as amended, (FWPCA) and the OEPA-USEPA Memorandum of Agreement, a stipulation and proposed permit for the referenced facility. The transmittal letter noted that the schedule of compliance for BPT effluent limitations in this permit extended beyond July 1, 1977. A 45-day period was specified for this Agency's response. Subsequently, the response time was extended to April 1, 1976, by mutual agreement of our respective agencies.

Because of the legal and policy implications involved in extending the statutory requirement for achievement of BPT by July 1, 1977, (Section 301 of the FWPCA), Region V asked USEPA Headquarters for review and

comment. The recommendation of the Deputy Assistant Administrator for Water Enforcement is attached to this letter.

We have also engaged in numerous extended discussions of this permit and the problems it poses, most recently a conference call on March 29, 1976, among Region V staff, a representative of the Ohio Attorney-General, and counsel and others for Republic Steel Corporation.

Based on the record presented, the transcript of proceedings, the proposed NPDES permit, and the Stipulation of the parties, Region V, USEPA, hereby makes the following findings:

1. Permit No. D 300°AD was issued to Republic Steel Corporation for its Canton, Ohio facility on June 10, 1974. Final effluent guidelines for the Iron & Steel Industry had not been promulgated as of the date of permit issuance.

2. The final effluent limitations specified in the proposed permit represent BPT as stipulated by the OEPA and Republic in the absence of promulgated guidelines. By letter of February 24, 1976 from A. H. Manzardo to Ned Williams, Region V concurred in the appropriateness of the final limitations.

3. An adjudicatory hearing was held to consider the Schedule of Compliance for achieving the final limitations specified in the permit.

4. As a result of said hearing, it was stipulated by the parties (OEPA) and Republic Steel) that the Schedule of Compliance specified in the proposed permit is reasonable for achieving the final limitations in the permit.

5. The reasonableness of the Schedule of Compliance is not questioned by USEPA.

6. The FWPCA mandates compliance with BPT no later than July 1, 1977.
7. The Schedule of Compliance runs for 41 months and would result in achievement of BPT subsequent to July 1, 1977.
8. The Administrator of the USEPA, in NPDES Appeal No. 75-9, Bethlehem Steel Corporation, dated September 30, 1975, and the USEPA General Counsel in Decision No. 26, Bethlehem Steel Corporation, dated July 24, 1975 have held that compliance with BPT limitations must be achieved no later than July 1, 1977.

Based upon the foregoing findings, Region V, USEPA, has determined that the stipulation and proposed permit for Republic Steel Corporation, Canton, Ohio facility, would violate Section 301 of the FWPCA in that the Schedule of Compliance for BPT extends beyond July 1, 1977, and for that reason, Region V, USEPA, objects to the issuance of said permit. If the proposed permit can be revised to conform with the requirements of the FWPCA, this objection will be withdrawn.

Very truly yours,

/s/ James O. McDonald
JAMES O. McDONALD
Director
Enforcement Division

Attachment

cc: Mr. John Daniel
Office of the Attorney General
State of Ohio

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Feb. 25, 1976

OFFICE OF ENFORCEMENT

MEMORANDUM

TO: Director, Enforcement Division, Region V

FROM: Deputy Assistant Administrator for Water Enforcement

SUBJECT: Republic Steel Corporation, Canton, Ohio
Stipulation and Proposed NPDES Permit

This is in response to your letter of January 22, 1976, regarding the Ohio EPA proceedings on the above-identified permit.

We have reviewed the Ohio EPA letter to your office dated January 5, 1976, the "Stipulation" between the State of Ohio and Republic Steel bearing a filing date of January 2, 1976, the proposed OEPA permit, No. D 300 °AD, bearing a filing date of January 2, 1976, and the transcript of proceedings in the Ohio adjudicatory hearing.

In our opinion, U.S. EPA must object to the schedule of compliance in the proposed Ohio permit on the ground that it is outside the requirements of section 301 of the Federal Water Pollution Control Act.

/s/ Jeffrey G. Miller
JEFFREY G. MILLER

APPENDIX G

United States Constitution

ARTICLE I, SECTION 9, CLAUSE 3

No Bill of Attainder or ex post facto law shall be passed

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code

Federal Water Pollution Control Act, 33 U.S.C.A. § 1251 et seq., as amended by the 1977 Amendments, Public Law 95-217, 91 Stat. 1566. Provisions omitted by the 1977 Amendments are enclosed in brackets, provisions adding new material are printed in italics, unchanged provisions are printed in roman.

Section 301(a) - (b)

Sec. 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this Act there shall be achieved –

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to any State law or regulations. (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

(2)(A) [not later than July 1, 1983] *for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph,* effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations

issued by the Administrator pursuant to section 304 (b)(2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act; [and]

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 201(g)(2)(A) of this Act [.];

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitation in accordance with subparagraph (A) of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304 (a)(4) of this Act shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

Section 304(b)

(b) For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall –

(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering

aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories of classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administration deems appropriate; [and]

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of pòint sources, taking into account the cost of achieving such elimination of the discharge of pollutants[.]; *and*

(4)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best conventional pollutant control technology (including measures and practices) for classes and categories of point

sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best conventional pollutant control technology measures and practices to comply with section 301(b)(2)(E) of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

Section 306(b)(1)(A)

(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;
paperboard, builders paper and board mills;
meat product and rendering processing;
dairy product processing;
grain mills;
canned and preserved fruits and vegetables processing;
canned and preserved seafood processing;
sugar processing;

textile mills;
cement manufacturing;
feedlots;
electroplating;
organic chemicals manufacturing;
inorganic chemicals manufacturing;
plastic and synthetic materials manufacturing;
soap and detergent manufacturing;
fertilizer manufacturing;
petroleum refining;
iron and steel manufacturing;
nonferrous metals manufacturing;
phosphate manufacturing;
steam electric powerplants;
ferroalloy manufacturing;
leather tanning and finishing;
glass and asbestos manufacturing;
rubber processing; and
timber products processing.

Section 309(a) - (d)

SEC. 309. (a)(1) whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 301, 302, 306, 307, [or] 308, *318, or 405* of this Act in a permit issued by a State under an approved permit program under section 402 *or 404 of this Act, he* shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of

this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), *except where an extension has been granted under paragraph (5)(B) of this subsection,* the Administrator shall enforce any permit condition or limitation with respect to any person —

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, [or] 308, *318, or 405* of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by him or by a State *or in a permit issued under section 404 of this Act by a State,* he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. [Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to ex-

ceed thirty days, which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.] In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 308 of this Act shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this Act or in any permit issued under this Act, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 402 of this Act was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compli-

ance with such requirements are under construction, grant an extension of the date referred to in section 301(b)(1)(A) to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 301(b)(1) (A) or (C) of this Act, (B) that such person cannot meet the requirements for a time extension under section 301(i)(2) of this Act, and (C) that the most expeditious and appropriate means of compliance with this Act by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this Act at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c)(1) Any person who willfully or negligently violates section 301, 302, 306, 307, or 308 of this Act, or any permit condition or limitation implementing any of such actions in a permit issued under section 402 of this Act by the Administrator or by a State, *or in a permit issued under section 404 of this Act by a State,* shall be punished by a fine of not less than $2,500 nor more than $25,000 per day

of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 502(5) of this Act, any responsible corporate officer.

(d) Any person who violates section 301, 302, 306, 307, [or] 308, *318 or 405* of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State, *or in a permit issued under section 404 of this Act by a State,* and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

Section 402(a) - (f), (k)

Sec. 402. (a)(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge

will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into navigable waters issued pursuant to section 13 of the Act of March 3, 1899, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899, after the date of enactment of this title. Each application for a permit under section 13 of the Act of March 3, 1899, pending on the date of enactment of this Act shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable

waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) of this Act, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with any applicable requirements of sections 301, 302, 306, 307, and 403;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require *the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to* adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304[(h)](*i*)(2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) of this Act.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the is-

suance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act. *Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.*

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) *In any case where, after the date of enactment of this paragraph, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act.*

(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 of this Act, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection

(d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

* * * *

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

Section 505

Sec. 505. (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator.

except that such action may be brought immediately after such notification in the case of an action under this section

respecting a violation of sections 306 and 307(a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term "effluent standard or limitation under this Act" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard or performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; or (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this

Act (including a requirement applicable by reason of section 313 of this Act).

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

78-820

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

Supreme Court, U.S.
FILED
JAN 10 1979
MICHAEL RODAK, JR., CLERK

No. 78-280

REPUBLIC STEEL CORPORATION,
Petitioner,

vs.

DOUGLAS M. COSTLE, ADMINISTRATOR
Environmental Protection Agency, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT NED E. WILLIAMS, DIRECTOR OF THE OHIO ENVIRONMENTAL PROTECTION AGENCY, IN OPPOSITION

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IN THE

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OCTOBER TERM , 1978

No. 78-280

REPUBLIC STEEL CORPORATION,
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DOUGLAS M. COSTLE, ADMINISTRATOR
Environmental Protection Agency, et al.,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT NED E. WILLIAMS, DIRECTOR OF THE OHIO ENVIRONMENTAL PROTECTION AGENCY, IN OPPOSITION

Respondent Ned E. Williams, the Director of the Ohio Environmental Protection Agency, files this brief in opposition to Republic Steel Corporation's petition for a writ of certiorari to review the judgment herein of the Sixth Circuit Court of Appeals.

STATEMENT OF THE CASE

1. Administrative Proceedings In This Case

This case arises out of the action of the Administrator of the United States Environmental Protection Agency ("EPA") in disapproving a National Pollutant Discharge Elimination System ("NPDES") permit proposed by the Ohio Environmental Protection Agency ("Ohio EPA") for issuance to Republic for its steelmaking plant in Canton, Ohio.

On June 10, 1974, the Ohio EPA issued a draft NPDES permit for the Canton plant. Republic requested an adjudication hearing on the proposed permit in a timely manner. Therefore the permit, as originally proposed, never became effective.

Republic and Ohio EPA then engaged in extensive negotiations which culminated in an August 1, 1975, agreement between them which resolved all issues raised by Republic except the length of the compliance schedule to be contained in the permit. The final effluent limitations which were agreed upon in the stipulation were different from those contained in the original proposed permit.

An adjudication hearing was held on August 21 and 22 and September 2, 1975, to resolve the issue of the date for achieving the final effluent limitations.

After the hearing, the Ohio EPA on January 5, 1976, submitted to EPA Region V a proposed permit which required achievement of the agreed-upon final effluent limitations pursuant to the schedule of compliance the reasonableness of which had been the subject of Republic's evidence at the adjudication hearing. The hearing record was also submitted to EPA Region V.

By letter of March 30, 1976, U.S. EPA Region V objected to the issuance of the permit submitted to it by Ohio EPA on Juanuary 5, 1976. (App. F. infra). That objection contained a specific finding that the final effluent limitations contained in the permit represented BPT effluent limitations for Republic's Canton facility in the absence of such guidelines promulgated by the Administrator and that the compliance

schedule in the permit was reasonable, but that as a matter of law compliance with BPT effluent limitations must be achieved no later than July 1, 1977. Thus, since the compliance schedule's authorization of attainment of those effluent limitations after July 1, 1977, violated Section 301 of the FWPCA, the Administrator objected to the issuance of the permit.

2. Judicial Proceedings In This Case

Republic petitioned the United States Court of Appeals for the sixth Circuit for review of EPA's disapproval which denied the issuance of the proposed permit to Republic. The court of appeals held that Section 301 (b) (1) (A) did not require achievement of the final effluent limitations in the proposed permit by July 1, 1977, overruled the Administrator's objection and remanded the case to EPA for further consideration. *Republic Steel Corporation v. Train,* 557 F.2d 91 (CA6 1977) *(Republic Steel I).*

U.S. EPA petitioned this Court for a writ of certiorari to review *Republic Steel I.* While EPA's petition was pending, the FWPCA was amended on December 27, 1977, by the enactment of Public Law 95-217, 91 Stat. 1566 ("The Clean Water Act of 1977"). Shortly thereafter, this Court granted the petition and summarily vacated and remanded this case to the court of appeals "for further consideration in light of Public Law 95-217."

On remand, the court of appeals upheld EPA's disapproval of the permit and denied Republic's petition for review. *Republic Steel Corporation v. Costle*, No. 76-1557 (August 21, 1978) (*"Republic Steel II"*). From that decision Republic has brought its petition to this Court for a writ of certiorari to the Sixth Circuit to review the decision in *Republic II*.

QUESTION PRESENTED

WHETHER THE LEGISLATIVE HISTORY OF PUBLIC LAW 95-217, THE CLEAN WATER ACT OF 1977, INDICATES THAT THE ADMINISTRATOR CORRECTLY APPLIED THE FEDERAL WATER POLLUTION CONTROL ACT OF 1972 IN OBJECTING TO THE STATE NPDES PERMIT WHICH CONTAINED A CONDITION WHICH AUTHORIZED ATTAINMENT OF BPT EFFLUENT LIMITATIONS AFTER JULY 1, 1977.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Republic's petition to this Court possesses three significant defects: (1) an erroneous perception of the Sixth Circuit's alleged "retroactive" application of the requirements of the Clean Water Act; (2) premature concern with constitutional issues; and (3) an unsuccessful attempt to create a conflict between the holdings of the Sixth and Ninth Circuits. The cumulative effect of these defects is a petition which should be denied. The errors contained in Republic's petition will be discussed in the order provided above.

I. **THE SIXTH CIRCUIT CORRECTLY FOLLOWED THIS COURT'S INSTRUCTIONS ON REMAND TO CONSIDER THE ADMINISTRATOR'S OBJECTION TO THE OHIO NPDES PERMIT FOR PETITIONER REPUBLIC'S CANTON FACILITY IN LIGHT OF PUBLIC LAW 95-217, THE CLEAN WATER ACT AMENDMENTS OF 1977, AND CONCLUDED THAT THE OBJECTION SHOULD BE SUSTAINED.**

A. **Republic Has Improperly Interpreted The Decision Below To Require Retroactive Application Of Requirements Contained In The Clean Water Act of 1977.**

The fatal flaw in Petitioner's analysis is exposed in the language used by the Petitioner in the first question presented by the petition. Republic presents its first question as follows:

> Whether the Federal Water Pollution Control Act, as amended on December 27, 1977, establishes an unconditional, RETROACTIVELY APPLICABLE JULY 1, 1977, DEADLINE, for achieving effluent limitations where those limitations were not administratively defined in time to permit achievement by such date. Petition at 2. (emphasis supplied).

Repeatedly Republic characterizes the decision below as applying the requirements of the Clean Water Act[1] retroactively. See Petition at 2, 7, 8, 13, 14. That characterization, however, is the result of Republic's failure to understand that the decision below did not rely upon Public Law 95-217 as creating new legal obligations which were then retroactively imposed upon Republic, but rather the *Republic II* decision simply considered the 1977 amendments and their legislative history as evidence of the Congressional intent behind the requirement in Section 301 (b) (1) (A), 33 U.S.C. Section 1311 (b) (1) (A), to achieve best practicable control technology currently achievable ("BPT") effluent limitations by July 1, 1977, as contained in the 1972 version of the Federal Water Pollution Control Act ("FWPCA"). A review of the history of this case and the Sixth Circuit's decision in *Republic I* makes Republic's misinterpretation of the decision in *Republic II* quite evident.

B. **Pursuant To This Court's Remand In Republic I The Sixth Circuit Was Directed To Review Its Decision In Republic I That The July 1, 1977, Deadline For Attaining BPT Is No Longer An Applicable Requirement Due To The Failure Of The Administrator To Promulgate BPT Guidelines In A Timely Manner In Light Of Public Law 95-217, The Clean Water Act of 1977.**

1 In this brief the Federal Water Pollution Control Act of 1972 as amended in 1977 by Public Law 95-217 shall be referred to as the Clean Water Act. The pre-1977 version of the Act will be referenced as the Federal Water Pollution Control Act ("FWPCA")

The essence of the Sixth Circuits's holding in *Republic I* was that the failure of the Administrator to promulgate BPT effluent guidelines in a timely manner pursuant to Section 304(b) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. Section 1314(b), rendered unenforceable the mandate of Section 301(b) (1) (A), 33 U.S.C. Section 1311(h) (1) (A), to achieve BPT effluent limitations by July 1, 1977. Therefore, the Court concluded that the July 1, 1977, deadline contained in Section 301(b) (1) (A) was no longer an applicable requirement of the FWPCA which could support the Administrator's objection to an Ohio EPA NPDES permit. In reaching this conclusion the court first declared that:

> Republic contends that the language of Section 301 (b) (1) (A) (i) expressly conditions adherence to the July 1, 1977, deadline upon definition BY THE ADMINISTRATOR OF BPT effluent limitations and guidelines PURSUANT TO SECTION 304(b) OF THE ACT. Therefore the Administrator's failure to satisfy this condition precedent by publishing final regulations for alloy and stainless steel manufacturing excuses Republic's noncompliance with the July 1 date. We reluctantly agree. The import of the section is unequivocal: federal regulations must exist before dischargers can be compelled to honor dates for implementing them. *Republic Steel Corp. v. Train*, 557 F.2d 91, 95 (6th Cir. 1977), vacated and remanded *sub. nom., Costle v. Republic Steel Corp.*, 98 S. Ct. 761 (1978), 434 U.S. 1030 (emphasis in original)

In addition, the Sixth Circuit also relied upon the following interpretation of the entire statutory framework:

> The presence within the Act of successive deadlines for promulgation of standards, issuance of permits, and conformance with effluent limitations bespeaks a rational implementation strategy anticipating a discrete sequence of events. . . . *Id.* at 95.

The court then concluded that:

> Our holding that Section 301(b) (1) (A) (i) is made unenforceable by the Administrator's failure to promulgate necessary regulations is tantamount to a finding that the July 1, 1977, deadline is no longer an "applicable requirement" of the Act. *Id.* at 97

In granting U.S. EPA's petition for a writ of certiorari the Supreme Court vacated the decision in *Republic I* and remanded the case "for further consideration in light of Public Law 95-217" *Costle v. Republic Steel Corp.*, 434 U.S. 1030, 98 S. Ct. 761 (1978)[2]. Thus on remand the Sixth Circuit was directed by this Court to review its previous conclusion that the July 1, 1977, deadline for attainment of BPT was no longer an applicable requirement of the FWPCA due to the Administrator's failure to promulgate BPT guidelines in a timely manner in light of Public Law 95-217 from which the Clean Water Act of 1977 resulted.

In performing this review, the Sixth Circuit did not, as Republic alleges, retroactively apply the 1977 version of the Act. Rather, the court, based upon a careful review of the legislative history of Public Law 95-217, and at the urging of Respondent Williams,[3] concluded that, contrary to its decision in *Republic I*, the failure of the Administrator to promulgate BPT guidelines

2 The effect of this Court's order vacating the Sixth Circuit's decision in *Republic I* upon that decision was to "annul it, set it aside, or to render it void". *Stewart v. O'Neal*, 237 F. 897, 903, (6th Cir. 1917). Thus when the Sixth Circuit, in *Republic II* at 3, stated that the 1977 Act "effectively overruled" the *Republic I* decision, it was obviously speaking in a figurative sense. Since this Court's order vacating that decision rendered it void, there was literally nothing left to be overruled. Yet Republic's retroactivity interpretation places great emphasis on that statement.

3 Respondent Williams was in a particularly unique position to assist the Sixth Circuit in assessing the significance of Public Law 95-217. In *Republic I*, Respondent Williams concurred with Petitioner Republic's position that the Administrator's objection to Respondent Williams' issuance of the NPDES permit to Republic was improper. 557 F.2d at 95, fn. 12. The legislative history of Public Law 95-217 was so overwhelming in its support of the Administrator's interpretation of the law that on remand Respondent Williams urged the Sixth Circuit to sustain the Administrator's objection to Respondent Williams' issuance of the permit.

in a timely manner did not justify the inclusion in an NPDES permit of a condition authorizing attainment of BPT effluent limitations subsequent to July 1, 1977. Thus the decision below involves an interpretation of the 1972 version of the FW PCA, not a retroactive application of changes made by the 1977 amendments. The provisions of the Clean Water Act's legislative history which support the Court's holding in *Republic II* as to the inflexibility as a permit condition of the July 1, 1977, deadline in Section 301 (b) (1) (A), 33 U.S.C. Section 1311 (b) (1) (A), of both the 1972 and 1977 versions of the Act are reviewed in subsections IC and ID of this brief.

C. The Provisions Of The Clean Water Act Concerning The Continuing Validity Of The July 1, 1977 Deadline For Industrial Dischargers Not Connecting To A Municipal System Are Based Upon Senate Bill 1952 Which Amended Section 301.

During the consideration of amendments to the FWPCA both Houses of Congress demonstrated an awareness of the need for flexibility within the statute to deal with situations where the strict application of the July 1, 1977, date could lead to undue hardship. In Section 13 of H.R. 3199 the House of Representatives voted to add a new subsection (g) to Section 301 which would have allowed the Administrator to extend the attainment date in individual NPDES permits up to July 1, 1979. This approach was frequently referred to during the debates on H.R. 3199 as the "case by case extension" approach. 123 *Cong. Record* H. 3027, 3037 (daily ed. April 5, 1977).

In contrast to this approach, however, was the mechanism adopted by the Senate in S. 1952. Rather than authorizing case by case extensions of the July 1, 1977 deadline for obtaining BPT pursuant to Section 301, the Senate left the July 1, 1977 deadline intact and amended Section 309 (a) to provide the Administrator with greater flexibility in the enforcement of the July 1, 1977 deadline. Section 41 of S. 1952 amended Section 309 (a) of the FWPCA in part as follows:

> (5) (B) The Administrator may, if he determines that such violation is the result of actions or conditions outside the control of such person and (i) such person has acted in good faith; (ii) such person had made a commitment (in the form of contracts or other security) of necessary resources to achieve compliance at the earliest possible date after July 1, 1977, but in no event later than January 1, 1979; (iii) such extension will not result in imposition of any additional controls on any other point or nonpoint source; (iv) application for permits under section 401 of this Act was filed prior to December 31, 1974; and (v) the facilities necessary for compliance with such requirements are under contruction, grant an extension of the date referred to in section 301 (b) (1) (A) to a date which will achieve compliance at the earliest time possible but not later than January 1, 1979. 123 *Cong. Record* S 13625 (daily ed. Aug. 4, 1977).

Thus while both Houses of Congress were concerned about the need for flexibility in the application of the July 1, 1977 deadline, each House adopted a different mechanism to deal with the problem. Therefore the resolution by the Conference Committee of the dispute between the Houses as to the mechanism for creating flexibility in the application of the 1977 deadline is the key to understanding the impact of Public Law 95-217 upon a determination of the validity of the Administrator's objection to Republic's permit.

As indicated in footnote six (6) of *Republic II*, at a4, the "JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE" contained in House Conference Rept. No. 95-380, *U.S. Code Congressional and Administrative News*, 6671-73 (January, 1978), reports that the Conference Committee adopted a modified version of the Senate approach. It is therefore appropriate to analyze the legislative history of the Senate version of Section 309 (a) (5) (B) and consider its impact.

D. The Legislative History Of Section 309 (a) (5) (B) Indicates That It Is The Sole Mechanism For Granting Relief To Dischargers Who, Through No Fault Of Their Own, Are Unable To Comply With The July 1, 1977 Deadline For Achieving BPT.

There are three aspects of the legislative history of the Clean Water Act, particularly the Senate amendments which resulted in Section 309 (a) (5) (B), which are salient to the issue which is before this Court: first, the July 1, 1977 deadline in Section 301 (b) (1) (A) for obtaining BPT is inflexible and is not conditioned upon timely promulgation of effluent guidelines by the administrator; second, good faith inability to comply with the deadline is a matter of enforcement discretion, not an issue in a permit proceeding; and third, the Senate version is a codification of the Administrator's interpretation of the FWPCA of 1972. Respondent will analyze the first aspect separately, the second and third together, and then discuss their cumulative effect on the Sixth Circuit's rejection in *Republic II* of its previous conclusion in *Republic I*.

1. The July 1, 1977 deadline in Section 301 (b) (1) (A) of the FWPCA was to be treated as inflexible and the failure of U.S. EPA to promulgate guidelines did not alter that inflexibility.

Senate Report No. 95-370 which accompanied S. 1952 from Senate Environment and Public Works Committee to the full Senate explained the need for Section 309 (a) (5) (B) as follows:

> Under existing law there are no circumstances that justify a time for compliance extending beyond July 1, 1977. The administrator can only issue an enforcement order requiring compliance within 30 days or initiate civil or criminal action. THUS, THE DECISION OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT IN REPUBLIC STEEL CORPORATION V. TRAIN ET AL AND WILLIAMS, ___F.2d___, (6th CIR. 1977) WAS AN INCORRECT INTERPRETATION OF EXISTING LAW. This amendment responds to the legitimate concern of dischargers who, despite good faith efforts, will not comply with the 1977 requirements. To accommodate this objective, the committee amended section 309 (a) of the act to authorize the Administrator in his discretion, to pursue one of two new options with regard to a discharger out of compliance.

> This modification of the provisions of the act with respect to enforcement should eliminate the need for Congress to consider at some later date further case-by-case extensions, waivers, or other relief. *U.S. Code Congressional and Administrative News,* 6593, (January, 1978) (emphasis supplied).

In *Republic II* at a4-5, the court below specifically noted this rejection of the conclusion in *Republic I* that Congress intended to make the Administrator's timely performance of his duty under Section 304 (b), 33 U.S.C. Section 1314 (b) a condition precedent to Petitioner's compliance with Section 301 (b) (1) (A).

Repeatedly the debates in the Senate reflect support for the amendment to Section 309 (a) (5) (B) because, contrary to the rationale of *Republic I,* there was no flexibility in the application of the July 1, 1977 date under the FWPCA. For example, Senator Wallop, while urging adoption of the bill, declared:

> The 1972 act requires industrial pollution sources to install what has been defined by EPA as best practicable control technology by 1977, and best available control technology by 1983. HOWEVER, THE EPA HAD NOT BEEN GRANTED THE DISCRETION TO PROVIDE FLEXIBILITY IN THESE REQUIREMENTS, or to take into consideration the costs of compliance, the quality of the receiving waters, or other special circumstances. 123 *Cong. Record.* S 19678 (daily ed. Dec. 15, 1977). (emphasis supplied).

Thus the legislative history of the Clean Water Act convinced the Sixth Circuit that it had previously misinterpreted the FWPCA to include a degree of flexibility which Congress did not intend to authorize in the 1972 version of the FWPCA. This conclusion raises no retroactivity problem. It is simply a matter of recognizing that the intent behind Section 309 (a) (5) of the Clean Water Act was to provide flexibility because Section 301 (b) (1) (A) in the 1972 version of the FWPCA was inflexible. Therefore it would be unlawful to grant to Republic any extension of time to obtain BPT based upon an interpretation of the 1972 version of the Act as creating flexibility in the date for attainment of BPT guidelines. Thus in *Republic II* the Sixth Circuit properly concluded that the only relief available to Republic is that which is provided in the new Section 309 (a) (5) of the Clean Water Act.

2. The Clean Water Act is a statutory codification of the Administrator's policy of treating good faith inability to comply with the July 1, 1977 deadline as an enforcement matter under Section 309 rather than a matter which affects the terms of an NPDES permit issued pursuant to Section 402 and Section 301.

The persistent theme that runs throughout the legislative history of the Clean Water Act is that the problems arising from failure to meet BPT limitations by July 1, 1977, are to be handled as enforcement matters under Section 309 rather than by providing an extension of the July 1, 1977 deadline in the permit issuance process pursuant to Section 402 of the Clean Water Act, 33 *U.S.C.* Section 1342[4]. When S. 1952 was introduced to the Senate, Senator Muskie, the chairman of the Senate Committee, explained:

> For thoses industrial dischargers not in compliance, the bill provides the Administrator with yet another tool by, in effect, SANCTIONING WHAT HAS BEEN A POLICY OF DUBIOUS LEGALITY WITH RESPECT TO DELAYS IN COMPLIANCE . . .
>
> [T] hese amendments allow the Administrator, at his initiative, to grant a simple extension of 18 months to a source whose facilities are under construction but could not have been completed by July 1, 1977. THIS IS SIMPLY A CODIFICATION OF THE ENFORCEMENT COMPLIANCE SCHEDULE LETTER PROCESS WHICH THE ADMINISTRATOR HAS USED FOR SOURCES WHICH, IN GOOD FAITH, HAVE TRIED TO COMPLY WITH THE LAW.
>
> The Environmental Protection Agency has developed an enforcement strategy under current authority to initiate enforcement actions only against recalcitrant major dischargers. Dischargers who are going to miss the July 1, 1977, deadline through no fault of their own will not be subject to enforcement actions; instead, they will receive enforcement compliance schedule letters, stating a specific date by which they must comply with a final deadline and an interim compliance schedule. THE COMMITTEE BILL, ESSENTIALLY, CODIFIES THIS POLICY. 123 *Cong. Record* Section 13538 (daily ed. Aug. 4, 1977) (emphasis supplied).

4 Section 402 (a) (1) requires the terms and conditions of all NPDES permits to be consistent with the mandate of Section 301 to achieve BPT effluent limitations by July 1, 1977.

Thus the Senate amendments to Section 309 (a) were essentially an attempt to codify the existing "Enforcement Compliance Schedule Letter" (herinafter "ECSL") policy developed by U.S. EPA. Thus, as noted in *Republic II* at a8, the Clean Water Act involves no retroactive creation of an inflexible deadline, but rather represents Congressional vindication of the Administrator's interpretation of the 1972 version of the Act.

One of the cornerstones of that ECSL policy is that the issue of post-1977 attainment of BPT due to circumstances beyond the discharger's control is not to be addressed within the context of the permit issuing process where the discharger would attain adjudicatory rights to litigate his "good faith" prior to an enforcement action but rather that the adjudication is to occur at the time of enforcement. As Senator Muskie's additional remarks emphasize, it was precisely the intent of the Senate to have good faith determined within the context of enforcement rather than permit proceedings:

> A case-by-case extension through section 301 for INDUSTRIAL DISCHARGERS would be a VARIANCE. IT WOULD PLACE A SIGNIFICANT ADMINISTRATIVE BURDEN ON THE RESOURCES OF THE AGENCY. EPA WOULD HAVE TO DETERMINE BAD FAITH BEFORE REJECTING A VARIANCE, WHICH DETERMINATION WOULD BE SUBJECT TO ADMINISTRATIVE PROCEDURES AND JUDICIAL REVIEW. BECAUSE THE ACTION FOCUSES ON A PARTICULAR "PERSON" AND IS THE MODIFICATION OF AN EFFLUENT LIMITATION, IT REQUIRES A FORMAL ADJUDICATION HEARING. THE DETERMINATION IS SUBJECT TO JUDICIAL REVIEW.
>
> * * *
>
> A GOOD FAITH VARIANCE WOULD CREATE A NEW LAYER OF REVIEW. IF THE INDUSTRY DID NOT LIKE THE VARIANCE DECISION, IT WOULD

ADJUDICATE IT. During the period of adjudication, it would seek a stay from the requirement. EPA would have to prove "bad faith" through every step of a cumbersome process.

ALTHOUGH THERE OCCASIONALLY ARE CASES IN WHICH THE DISCHARGER'S INABILITY TO COMPLY IS CLEARLY DUE TO FACTORS BEYOND ITS CONTROL, THE MAJORITY OF CASES REQUIRE EXTREMELY SUBJECTIVE JUDGMENTS. IN SUCH CASES, AN AGENCY DENIAL WOULD ALMOST CERTAINLY BE FOLLOWED BY AN APPEAL TO THE COURT OF APPEALS, THUS DELAYING AGENCY ENFORCEMENT EFFORTS. THERE IS ADEQUATE OPPORTUNITY FOR JUDICIAL REVIEW IN FEDERAL DISTRICT COURTS IN AN ENFORCEMENT ACTION. THE COMMITTEE BILL MAINTAINS THIS OPPORTUNITY. Id. at Section 13538-39. (emphasis supplied).

This reliance upon Section 309 (a) (5) (B) as an enforcement mechanism rather than a case-by-case extension device within the permit process is repeatedly evident throughout the legislative history. See Senate Report No. 95-370, *U.S. Code Congressional and Administrative News,* 6596 (January, 1978); House Conference Report No. 95-830, *U.S. Code Congressional and Administrative News,* 6672, (January, 1978); 123 *Cong. Record* S. 19650-51 (daily ed. Dec. 15, 1977).

Furthermore, when the Conference Committee's Report containing the Senate version of Section 309 (a) (5) (B) was presented to the House for approval, that mechanism was specifically referenced as the method for dealing with dischargers who were unable to obtain BPT due to the Administrator's failure to promulgate BPT guidelines in a timely manner. Congressman Johnson explained that:

[W]e do recognize that some sources may be out of compliance through no fault of their own, through equipment manufacturers' strikes or the unavailability of certain equipment or FAILURE OF THE EPA TO PUBLISH EFFLUENT GUIDELINES AND STANDARDS IN TIME. For this reason we have provided an extension of the July 1, 1977 deadline to April 1, 1979, only in those instances where the discharger can prove good faith with the law and lack of compliance because of its circumstances beyond the discharger's controls. 123 *Cong. Record* H 12944 (daily ed. Dec. 15, 1977). (emphasis supplied).

Based upon this extensive legislative history the Sixth Circuit correctly concluded that it was the clear intent of Congress to deal with good faith inability to obtain BPT limitations due to the failure of the Administrator to promulgate guidelines in a timely manner solely through the flexible enforcement mechanism authorized in Section 309 (a) (5) (B) of the Clean Water Act rather than in a review of the Administrator's objection to a state NPDES permit as the same court had attempted to do in *Republic I.*

3. The legislative history of the Clean Water Act indicates that in Republic I the court erroneously overruled the Administrator's objection to Petitioner's NPDES permit.

At this point it is appropriate to analyze the impact of the legislative history discussed above in subsections ID-1 and ID-2 of this brief upon the holding below.

In *Republic I* the Sixth Circuit perceived compliance with Section 301 (b) (1) (A) BPT by July 1, 1977, as the last step in a "discrete sequence of events" in the regulatory process. 557 F.2d at 95. Then the court concluded that since the entire regulatory sequence had not been completed by EPA, this justified negating the 1977 deadline for BPT. In *Republic II*, however, the Sixth Circuit then concluded that this rationale clearly did not withstand the repeated references in the legislative history of the Clean Water Act to the " inflexibility" of the July 1, 1977 deadline in Section 301 (*supra*, subsection ID-1 of this brief). Thus in light of Public Law 95-217, the Clean Water Act, the *Republic II* decision correctly perceives that the holding in *Republic I* that the failure of the Administrator to promulgate BPT guidelines in a timely manner negated the requirement for a July 1, 1977 deadline in Republic's NPDES permit was erroneous. Furthermore this does not involve retroactive legislation but rather a recognition of the fact that the *Republic I* decision was not a correct interpretation of the 1972 version of the Act.

In addition, *Republic I* equated the unenforceability of the July 1, 1977 date in a permit issued to Republic with a right vested in Republic to have a post-1977 compliance date in the NPDES permit itself. 557 F.2d at 97. As the legislative history of the Clean Water Act indicates, however, the whole thrust of Section 309 (a) (5) (b) is to vindicate the Administrator's interpretation of the 1972 version of the FWPCA and to explicitly place enforcement considerations under the enforcement section of the Act rather than under those sections relating to the issuance of permits. Indeed to allow dischargers to litigate enforceability issues within the context of permit proceedings is to create another mechanism for the types of litigation related delays which have plagued U.S. EPA's attempts to implement the national water pollution abatement program. As Senator Muskie pointed out, using permit proceedings as variance proceedings to litigate the enforceability of compliance dates only creates an additional layer of litigation during which the clean up program dawdles. 123 *Cong. Record* 13538-39 (daily ed. Aug. 4, 1977).

Thus, the vindication of the Administrator's policy by the Clean Water Act clearly indicates that it is improper to attempt to give Republic relief during the administrative permit issuance process. Instead, the relief must come in the first instance from the Administrator by means of his exercise of the discretionary enforcement authority granted to him in Section 309 (a) (5) (B). Thus, the decision in *Republic II* correctly concluded that Public Law 95-217 supports the Administrator's interpretation of the inflexible nature of the July 1, 1977, deadline in Section 301 (b) (1) (A) of both the 1972 and 1977 versions of the Act which precludes the inclusion in an Ohio NPDES permit of a condition providing for post July 1, 1977, attainment of BPT effluent limitations.

II. REPUBLIC'S PETITION FAILS TO PRESENT ANY CONSTITUTIONAL CLAIMS WHICH ARE APPROPRIATE FOR REVIEW AT THIS TIME.

The second question presented by Republic's petition concerns an alleged violation of its constitutional rights because it is potentially subject to civil and criminal penalties for violation of the July 1, 1977, deadline date which must be contained in its permit. (Petition at 2,11, 12, 13). Since the legislative history of the Clean Water Act clearly indicates that this issue should be addressed within the context of enforcement proceedings rather than in administrative permit issuance proceedings, it would not be appropriate for the Court to address the issue at this time. The inappropriateness of such review at this time is apparent for several reasons.

First, Section 309 (a) (5) (b) clearly provides a mechanism for Republic to obtain relief if it has truely made every good faith effort to comply but has been prevented from so doing by circumstances beyond its control. Yet Republic has stubbornly refused to request such relief from the Administrator[5] and has insisted that it wants such relief only in the form of a post-1977 compliance date in its NPDES permit. Thus, it would be entirely inappropriate for this Court to address Republic's alleged constitutional dilemma while Republic may have in its own hands a means for resolution of that dilemma.

Second, there has been no serious threat of enforcement action against Republic by anyone, the United States, the State of Ohio, or a citizen by means of a citizens' suit.[6] If there is any substance to Republic's protestations that the imposition of substantial civil or criminal penalties would be a violation of its constitutional rights, that may be considered by the responsible agencies in the exercise of their prosecutorial discretion to refrain from bringing an enforcement action for such penalties. Thus Republic's petition would have this Court address hypothetical violations of constitutional rights when they actually may never occur.

5 During oral argument in *Republic II* counsel for Respondent Costle indicated that Republic would receive such relief if Republic submitted an application which showed that it was deserving of such relief as measured by the criteria established by Congress in Section 309 (a) (5) (b).

6 No sixty (60) day notice of intent to file a citizens' suit against Republic has been filed with either U.S. EPA or Ohio EPA. See section 505 (b), 33 U.S.C. Section 1365 (b).

Finally, even if an enforcement action were actually brought, Republic could seek minimization of a penalty on the grounds of its good faith. As Senator Muskie noted:

> The legitimate concerns of those industrial dischargers who cannot comply with their pollution abatement requirements by July 1, 1977, through no fault of their own, is adequately handled by the Committee bill [Section 309 (a) (5)]. Such dischargers are further protected against any unjustified enforcement action by their ability to present their good faith as a mitigating factor to the district court which controls any enforcement action which may be brought. 123 *Cong. Record* 13539. (daily ed. Aug. 4, 1977).

"Good faith" is well-recognized as such a mitigating factor. *United States v. Beatrice Foods,* 493 F.2d 1259, 1269 (8th Cir., 1974), cert, denied, 420 U.S. 961 (1975); *United States v. General Motors Corp.,* 403 F. Supp. 1151 (D. Conn. 1975); *United States v. Swingline,* 371 F. Supp. 37 (E.D. N.Y. 1974). This would be particularly true under the Clean Water Act where the legislative history and the statute itself contain a clear recognition of good faith as a mitigating factor. Thus while on its face the Clean Water Act itself contains potentially substantial monetary penalties, they are maximums and do not control the discretion of a district judge to impose a minimal penalty if warranted by the circumstances. The seriousness of the constitutional question presented to this Court by a nominal penalty of one dollar ($1.00) as in *United States v. General Motors Corp., supra,* at 1165, would be entirely different from a one million dollar ($1,000,000.00) penalty. Yet Republic would press such an issue upon this Court at this time when it is clearly not appropriate for this Court to determine the matter. Therefore the petition should be rejected.

III. REPUBLIC'S PETITION FAILS TO ESTABLISH A TRUE CONFLICT BETWEEN THE DECISIONS OF THE SIXTH AND NINTH CIRCUITS

The final basis for Republic's petition is an alleged conflict between the Sixth Circuit's holding in *Republic II* and the Ninth Circuit's decision in *Washington v. EPA,* 573 F.2d 583, (9th Cir. 1978). That alleged conflict is, however, more apparent than real. Indeed, the Sixth Circuit itself noted the distinction between *Washington v. EPA, supra,* and *Republic II* as follows:

> The Ninth Circuit recently held that the Administrator could not veto a proposed permit for failure to require attainment of BPT by the discharger, where the Administrator had not yet promulgated applicable BPT guidelines. *Washington v. EPA,* 573 F.2d 583, 589-92 (9th Cir. 1978). The case is distinguishable in that here the Administrator did not object to the substantive effluent limitations in the proposed permit for the Canton Mill [as he did in *Washington v. EPA*] -- the objection related solely to the compliance schedule. Republic II at 7, footnote 9.

In its petition Republic dismisses this distinction with the conclusory charge that it is "untenable" with virtually no further explanation. Respondent Williams submits that a petition to this Court for a writ of certiorari should be supported by more than a conclusory statement.

In fact the Sixth Circuit's distinction between the two cases is correct. Section 402 (b) (2) (D), 33 U.S.C. Section 1342 (b) (2) (d) authorizes the Administrator to objection to a state NPDES permit when its terms and conditions are "outside the guidelines and requirements of the Act." In *Washington v. EPA, supra,* the Administrator had promulgated no BPT guidelines to bring his objection to the effluent limitations in the state permit within the scope of Section 402 (b) (2) (D). By contrast, in *Republic II* the Administrator objected to the compliance schedule in the Ohio NPDES permit, not the effluent limitations themselves, on the grounds that the compliance schedule violated the requirement in Section 301 (b) (1) (A) to achieve BPT effluent limitations no later than July 1, 1977. This objection was clearly authorized by Section 402 (b) (2) (D), and accordingly the Sixth Circuit has correctly sustained the objection. Thus, the distinction recognized by the Sixth Circuit between *Washington v. EPA, supra,* and *Republic II* is well taken.

Furthermore, far from creating a conflict, the *Republic II* decision restores harmony between the Third, Fourth, Sixth and Seventh Circuits concerning the inflexibility of the compliance date deadlines in Section 301 (b) of the Clean Water Act. Compare *Republic II* with *State Water Control Board v. Train,* 559 F.2d 921 (4th Cir. 1977); *United States Steel Corp. v. Train,* 556 F.2d 822 (7th Cir. 1977); and *Bethlehem Steel Corp. v. Train,* 544 F.2d 657 (1977) cert. denied *sub. nom., Bethlehem Steel Corp. v. Quarles,* 430 U.S. 975 (1977). In each of these cases four different circuits have reached the same conclusion, that an NPDES permit must contain an attainment date for authorized levels of discharge no later than the dates contained in Section 301 (b) (1). Thus, the decision below creates no conflict between the circuits which would support Republic's petition.

CONCLUSION

Republic's petition does not arise from a state court's determination of a federal question. The petition fails to correctly establish a conflict between the Sixth Circuit's decision below and that of any other circuit. Thus the petition does not present the type of matters listed in U.S. Supreme Court Rule 19 governing review on certiorari. Thus Republic's petition should be denied.

Respectfully submitted,

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APPENDIX A

No. 76-1557

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Republic Steel Corporation,
Petitioner,

v.

Douglas M. Costle, Administrator, U. S. Environmental Protection Agency,

George R. Alexander, Jr., Regional Administrator, U. S. Environmental Protection Agency,

Ned E Williams, Director, Ohio Environmental Pretection Agency,
Respondents.

On Remand from the Supreme Court of the United States.

Decided and Filed August 21, 1978.

Before: Celebrezze, Lively and Keith, Circuit Judges.

Celebrezze, Circuit Judge. This case is before the Court on remand from the Supreme Court for further consideration in light of the Clean Water Act of 1977, P.L. 95-217. In our previous decision we held that the Administrator of the United States Environmental Protection Agency (EPA) had improperly vetoed issuance of a water pollution permit to petitioner Republic Steel Corporation (Republic) for its Canton, Ohio,

mill. *Republic Steel Corp. v. Train,* 557 F.2d 91 (6th Cir. 1977) (herinafter referred to as *Republic Steel I*).[1] *Contra, United States Settl Corp. v. Train,* 556 F.2d 822, 854-55 (7th Cir. 1977).

The Administrator had objected to the permit, originally proposed by the Ohio Environmental Protection Agency (OEPA), on the ground that it improperly waived a July 1, 1977, statutory deadline for compliance with federal effluent standards. Under Section 301 (b) (1) (A) (i)[2] of the Federal Water Pollution Control Act as amended in 1972 (FWPCA) industrial dischargers were required to comply "not later than July 1, 1977" with "effluent limitations for point sources [requiring] the application of the best practicable control technology currently available, as defined by the Administrator pursuant to Section 304 (b)" of the Act. At the time of our previous decision EPA had not yet promulgated final regulations defining "best practicable technology currently available" (BPT) for categories of dischargers including iron and steel manufacturing, despite a requirement in Section 304 (b) (1)[3] of the Act that such regulations be published by October 18, 1973.[4]

1 The case initially came before us on a petition for review of the Administrator's action, pursuant to Section 309 (b) (1) (F) of the Federal Water Pollution Act, 33 U.S.C. Section 1369 (b) (1) (F). The particular action submitted for review was a decision by the Administrator under Section 402 (d) (2) (B) of the Act to "object to," and thereby veto, issuance of a water pollution permit for the Canton mill as proposed by the Ohio Environmental Protection Agency. We note that the United States Court of Appeals for the Ninth Circuit has since ruled that Section 509 (b) (1) (F) does not convey jurisdiction on the courts of appeals to review permit vetoes by the Administrator under Section 402 (d) (2) (B). *Washington v. E.P.A.,* 573 F.2d 583, 586-87 (9th Cir. 1978). This Court has already ruled *contra,* however, *Ford Motor Co. v. E.P.A.,* 567 F.2d 661, 668 (6th Cir. 1977), and we adhere to our earlier view. *See also Mianus River Preservation Comm. v. Administrator, E.P.A.,* 541, F.2d 899, 909 (2d Cir. 1976).

2 33 U.S.C. Section 1311 (b) (1) (A) (i).

3 33 U.S.C. Section 1314 (b) (1).

4 (Contd. on next page).

We reluctantly concluded that EPA's failure to timely define BPT precluded the Administrator from imposing a July 1, 1977, compliance deadline, since Congress had apparently established promulgation of regulations under Section 304 (b) as a necessary precondition for imposition of the deadline in Section 301 (b) (1) (A) (i). Our decision was designed "to relieve the discharger of the unfair consequences" of being forced to comply with the deadline in the absence of applicable standards for guidance. 557 F.2d at 97.

This Court stayed its mandate in *Republic Steel I* pending the EPA's petition for a writ of certiorari from the Supreme Court. Shortly after EPA filed its petition for certiorari, Congress enacted the Clean Water Act of 1977, which substantially revised FWPCA. In the wake of that enactment, the Supreme Court granted EPA's petition, vacated our judgment in *Republic Steel I,* and remanded the case to this Court for further consideration in light of the new law, *Costle v. Republic Steel Corp.,* ––U.S.––, 46 U.S.L.W. 3452 (1978).

We have reviewed the 1977 Act and conclude that its provisions have effectively overruled our previous decision. Although neither Section 301 (b) (1) (A) (i), requiring industrial dischargers to achieve BPT no later than July 1, 1977, nor Section 304 (b), requiring EPA to define BPT by October 18, 1973, were amended by the 1977 Act, Congress did add a new Section 309 (a) (5) (B)[5] providing as follows:

> (B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirement under this Act or in any permit issued under this

4 As of oral argument in this case (June 1978), EPA had still not promulgated final BPT guidelines for iron and steel manufacturing. In the absence of general standards, BPT has been determined on a case-by-case basis, either by the Administrator or by the responsible state agency. *See, e.g.,* OEPA regulation EP-31-04 (B) (1) (b) (1974).

5 33 U.S.C. Section 1319 (a) (5) (B).

Act, has acted in good faith, and has made a commitment in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (ii) that an application for a permit under section 402 of this Act was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the deate referred to in section 301 (b) (1) (A) to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

The legislative history of this provision makes it abundantly clear that Congress intended the procedure outlined therein to be the exclusive avenue of relief from the dictates of a mandatory and unconditional July 1, 1977, deadline. The Senate Report expressly rejected the rationale of *Republic Steel I*:[6]

> Under existing law there are no circumstances that justify a time for compliance extending beyond July 1, 1977. The Administrator can only issue an enforcement order requiring compliance within 30 days or initiate civil or criminal action. Thus, the decision of the U.S. Court of Appeals for the Sixth Circuit in *Republic Steel Corporation v. Train* et al and Williams, —— F.2d, (6th Cir. 1977) was an incorrect interpretation of existing law. This amendment responds to the legitimate concern of dischargers who, despite good faith efforts, will not comply with the, 1977 requirements. To accommodate this objective, the committee amended section 309 (a) of the act to authorize the Administrator in his discretion, to pursue one of two new options with regard to a discharger out of compliance.
>
> * * *

6 The Senate version of Section 309 (a) (5) (B) was adopted by the conference committee with only minor revision. H. R. Rep. No. 95-830, 95th Cong. 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 4424, 4463.

> The committee believes that a case has been made in our hearings on this bill that some relief from penalties must be granted for those sources which have made a good faith attempt to comply with the deadlines in the statute but for justifiable reasons have been unable to do so. The committee considered but rejected the alternative of providing a case-by-case extension of the deadline set out in the statute. That alternative was rejected because the committee felt that such a case-by-case extension would not only burden the administrative process but that it would provide further opportunity for delay for those sources which are otherwise unable to make a legitimate case for additional time. Consequently, decisions by the Administrator pursuant to this new provision of law should not be the subject of administrative hearings and appeals but rather, if the Administrator feels he cannot determine that a source meets the requirements of section 309 (a) (5) (B) that he will immediately proceed under any of the other enforcement options set out in section 309. This authorization of limited flexibility granted to the Administrator will maintain the pressure for compliance while at the same time enabling the Administrator to use his discretion to grant any justifiable extension.
>
> Sen. Rep. 95-370, 95th Cong., 1st Sess. reprinted in 1977 U. S. Code Cong. & Admin. News 4326, 4385, 4387.

The import of the statute is now plain: the July 1, 1977, deadline cannot be waived by the courts. To the extent that noncompliance occurs despite good faith efforts as defined in Section 309 (a) (5) (B), relief is available only via discretionary extension of the deadline by the Administrator.[7]

Republic urges that mere addition of a new remedial procedure does not change the operation of the rest of the Act as we construed it in *Republic Steel I*. We are bound, however, to read the amendment together with the original provisions of the Act "as parts of an integrated whole." *Markham v. Cabell*,

7 OEPA, which supported Republic's petition in *Republic Steel I*, now takes the position that the 1977 Act requires that we uphold EPA's position.

326 U.S. 404, 411 (1945). The unchanged sections and the amendment must generally be given "the most harmonious, comprehensive meaning possible" so that they do not conflict. *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947). *See also* 1A Sutherland, Statutory Construction Section 22.35 (1972). To insist on adherence to our earlier view would not only render Section 309 (a) (5) (B) largely meaningless, but also would defeat Congress' clearly expressed intent in enacting that section.

Moreover, the 1977 Act effectively responds to the concern we expressed in *Republic Steel I* that a discharger might suffer "unfair consequences" from EPA's failure to timely promulgate relevant BPT regulations. Under prior law, the Administrator had no clear statutory authority to extend the July 1, 1977, deadline and a discharger could be subjected to liability without any consideration for the reasons for his noncompliance.[8] The new Section 309 (a) (5) (B) clearly permits the Administrator to extend the deadline where noncompliance was caused solely by the lack of BPT guidelines.[9]

8 Prior to the 1977 Act, EPA did provide relief from the 1977 deadline on an informal basis. Under the "Enforcement Compliance Schedule Letter" (ECSL) program, the Administrator would agree to refrain from enforcement of the statutory deadline against certain dischargers who made good faith attempts at compliance. *See Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 659-60 (3d Cir. 1976), *cert. den.*, 430 U.S. 975 (1977).

9 The Senate Report indicates that Section 309 (a) (5) (B) was directed, in part, at dischargers whose noncompliance was caused by their inability to ascertain applicable standards, despite good faith attempts:

> The limited discretion granted to the Administrator by section 309 (a) (5) (B) may only be exercised where the Administrator is able to determine that a discharger acted in good faith. The term "good faith" is generally understood to mean a reasonable attempt to comply with the mandates of law. *Did the discharger attempt to determine what the applicable requirements were?* When the required technology was generally known in the industry, but the discharger had some legitimate disagreements with the Agency on other points, did the discharger begin on an abatement program or conversely did the discharger delay the

(contd. on next page).

We conclude, then, that the Administrator can properly object under Section 402 (d) (2) (B) of the Act to a proposed permit for a point source governed by Section 301 (b) (1) (A)-(i) if that permit does not require attainment of BPT by July 1, 1977, unless the Administrator has determined that a time extension is warranted pursuant to Section 309 (a) (5) (B).

This does not, however, end our inquiry. We must decide whether the 1977 Act may be applied in the context of this case, which was pending before the Supreme Court at the time the new law took effect.

The general rule is that "a court is to apply the law in effect at the time of its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). This principle applies with full force to an appellate court in reconsidering a decision that has been vacated and remanded by the Supreme Court in light of an intervening change in the law. *See Fruehauf Corp. v. Internal Revenue Service*, 566 F.2d 574, 577-79 (6th Cir. 1977).

(9 Contd.)

> abatement program pending the outcome of lengthy administrative procedures? When the required technology was the subject of a legitimate dispute with the Agency, did the discharger take all other measures that it was capable of (such as segregating waste streams, necessary site preparation, and outfall construction) or did it delay these practices pending the outcome of lengthy administrative procedures?

S. Rep. 95-370, 95th Cong., 1st Session, 1977 U.S. Code Cong. & Admin. News 4326, 4386 (emphasis supplied).

The Ninth Circuit recently held that the Administrator could not veto a proposed permit for failure to require attainment of BPT by the discharger, where the Administrator had not yet promulgated applicable BPT guidelines. *Washington v. EPA*, 573 F.2d 583, 589-92 (9th Cir. 1978). The case is distinguishable in that here the Administrator did not object to the substantive effluent limitations in the proposed permit for the Canton mill – the objection related solely to the compliance schedule. In any event, the Ninth Circuit holding failed to consider the possible impact of the 1977 Act on the Administrator's veto power under Section 402 (d) (2) (B).

The Clean Water Act of 1977 contains no "statutory direction or legislative history" militating against application of Section 309 (a) (5) (B) to pending cases.[10] To the contrary, the statute is applicable to "any person who *is* a violator of, or any person who *is* otherwise not in compliance with the time requirements" of the Act. Section 309 (a) (5) (B) (emphasis supplied). Moreover, the Senate Report indicates that the Section 309 procedure was intended to "codify" the informal EPA practice already in existence, under which the Administrator stood firm behind the 1977 deadline, but delayed enforcement where the discharge showed the requisite good faith efforts at compliance.[11] *See* Sen. Rep. No. 95-370, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 4326, 4386. The Conference Report likewise indicates that under the 1977 Act "the existing enforcement policy of the EPA is continued." H. R. Rep. No. 95-830, 95th Cong., 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4424, 4464.

Nor do we think that application of current law would result in manifest injustice. If Republic has made good faith efforts at compliance with the law that have been delayed only by EPA's failure to timely promulgate BPT standards,

10 The conference report contains language regarding "existing administrative and court orders":

> It is the intent of the conferees that under the provision which allows the Administrator to establish a reasonable time in which to comply with an enforcement order, existing administrative and court orders which provide for attainment dates beyond April 1, 1979, continue in effect unless modified under these amendments. Therefore, the existing enforcement policy of the EPA is continued.

H. R. Rep. No. 95-830, 95th Cong., 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4424, 4464.

This language has no application to the instant case, since there are no "existing" administrative or court orders providing for attainment dates beyond April 1, 1979, for the Canton mill.

11 *See* note 8, *supra.*

then the company will be eligible for an extension under Section 309 (a) (5) (B).[12] There is nothing fundamentally unfair in predicating relief from the deadline on a showing to the responsible agency that the polluter has made a "reasonable attempt to comply with the mandates of the law." Sen. Rep. 95-370, 95th Cong., 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4326, 4386. Indeed, to require anything less would work an injustice on the overwhelming majority of the nation's major industrial dischargers who followed the law as best they could and met the statutory timetable.[13] It would also flaunt the national commitment to attainment of water quality capable of supporting fish, wildlife and recreation by 1983, and the total elimination of pollutant discharges by 1985. 33 U.S.C. Section 1251 (a) (1) & (2). Application of current law is particularly favored where such matters of great national concern are at stake. *Bradley, supra,* 416 U.S. at 719-20.

The situation might be different if Republic could claim that its noncompliance was induced by administrative or judicial construction of Section 301 (b) (1) (A) (i) to the effect that the July 1, 1977, deadline was waived by EPA's failure to promulgate BPT guidelines. *See generally United States v. Pennsylvania Ind. Chem. Corp.,* 411 U.S. 655, 670-75 (1973). But in the years following enactment of FWPCA, EPA consistently took the official position that the statutory compliance date

12 We assume, as we must, that the Administrator will make the necessary determination with regularity and fairness. *See United States v. Morgan,* 313 U.S. 409, 421 (1941); *United States v. Chemical Foundation,* 272 U.S. 1, 14-15 (1926); K. C. Davis, Administative Law Treatise Section 11.06. *Cf. Withrow v. Larkin,* 421 U.S. 35, 47, 55 (1975).

13 According to the Senate Report, ninety percent of the nation's major industrial dischargers were expected to meet the 1977 deadline. Sen. Rep. No. 95-370, 95th Cong. 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4326, 4333.

was absolute and that it was not waived by the absence of BPT guidelines.[14] The first draft permit for the Canton mill issued by OEPA in June 1974 required compliance by September 1976. EPA's position as to the Act's time requirement was not challenged by a court of appeals until our decision in *Republic Steel I* on June 23, 1977 – only days before the July 1, 1977, deadline.[15] Republic can hardly claim that its noncompliance was induced by that decision, since by even the most conservative estimates the necessary equipment would take many months to construct.[16] Nor can the company maintain that it ever had a vested right in the result ordered in *Republic Steel I*, since our mandate there never took effect, and since the Supreme Court later vacated the judgment altogether. *Cf. Bradley, supra,* 416 U.S. at 270.

14 *See, e.g.,* United States Environmental Protection Agency, Decision of the General Counsel No. 4, in 1 Decisions of the Administrator and Decisions of the General Counsel [hereinafter "DGC"] 177, 181 (4-4-75), *aff'd,* Decision of the Administrator No. 75-5, 1 DGC 136, 144 (12-5-75); Decision of the General Counsel No. 11, 1 DGC 209, 210-11 (5-7-75); Decision of the General Counsel No. 23, 1 DGC 305, 314 (7-3-75); Decision of the General Counsel No. 26, 1 DGC 327, 328, 330-31 (7-24-75), *aff'd,* Decision of the Administrator No. 75-9, 1 DGC 106, 108-09 (9-30-75); Decision of the General Counsel No. 45, 2 DGC 27 (8-10-76).

See also United States Steel Corp. v. Train, 556 F.2d 822, 853-55 (7th Cir. 1977); *Bethlehem Steel Corp. v. Train,* 544 F. 2d 657, 660 (3d Cir. 1976); 40 C.F.R. Section 125.11 (c) (promulgated 5-22-73).

15 Similar considerations would preclude any possible applicability of the ex post facto clause to this case. The existence of the July 1, 1977, deadline, as construed by EPA was an "operative fact" sufficient to provide fair warning to Republic. *Dobbert v. Florida,* 432 U.S. 282, 297-98 (1977).

16 The same rationale precludes any claim that noncompliance with the deadline was induced by OEPA's agreement to a 42 month compliance schedule in the fall of 1975. Republic concedes that its duty to commence compliance measures attached prior to that agreement. *See Republic Steel I,* 557 F.2d at 94.

In any event, Republic does not seriously claim that its noncompliance with the July 1, 1977, deadline is the result of an honest belief that the deadline was invalid. Rather the company maintains that it was unable to meet the deadline, despite good faith efforts, because of the absence of BPT guidelines from EPA. If this is true, then the new Section 309 (a) (5) (B) procedure can provide any justified relief.[17]

The petition for review is dismissed.

17 We do not mean to suggest that Republic may in any sense be *entitled* to an extension as a matter of law. The decision on whether or not to grant an extension is committed to the Administrator's discretion, based on his assessment of the factors listed in Section 309 (a) (5) (B). Sen. Rep. 95-370, 95th Cong., 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4326, 4386-87. *See* Quarles, *Impact of the 1977 Clean Water Act Amendments on Industrial Dischargers,* Env. Rep. Monograph No. 25 at 2 (1978). *See generally Vermont Yankee Nuclear Power Corp. v. NRDC,* ––U.S.––, 46 U.S.L.W. 4301 (1978).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-1557

[Filed August 21, 1978]

Republic Steel Corporation,
Petitioner,

v.

Douglas M. Costle, Administrator, U. S. Environmental Protection Agency,

George R. Alexander, Jr., Regional Administrator, U. S. Environmental Protection Agency,

Ned E. Williams, Director, Ohio Environmental Protection Agency,
Respondents.

Before: Celebrezze, Lively and Keith, Circuit Judges.

Pursuant to the mandate of the Supreme Court of the United States, and upon consideration of the further briefs and oral argument of counsel,

It is ordered that the petition to review an order of the Environmental Protection Agency be and it is hereby dismissed.

Each party will bear its own costs on this appeal.

Entered by Order of the Court.
John P. Hehman, Clerk

By Grace Keller
(Chief Deputy Clerk)

Issued as Mandate: October 3, 1978
Costs: None

APPENDIX C

No. 76-1557

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Republic Steel Corporation,
Petitioner,

v.

Russell E. Train, Administrator, U. S. Environmental Protection Agency,

and

Ned E. Williams, Director, Ohio Environmental Protection Agency,
Respondents.

Petition to review action of the Administrator of the United States Environmental Protection Agency.

Decided and Filed June 23, 1977.

Before: Celebrezze and Lively, Circuit Judges, and Rubin,* District Judge.

Celebrezze, Circuit Judge. This case of first impression arises under the 1972 amendments to the Federal Water Pollution Control Act, P.L. 92-500.[1] The question presented is whether failure of the Administrator of the United States En-

* The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

1 33 U.S.C. Section 1251 *et seq.* (Supp. III 1973).

vironmental Protection Agency (EPA) to define interim effluent limitations reflecting a given level of pollution control technology, as required by the Act, frees an authorized state agency to issue a discharge permit which sanctions noncompliance with the statutory deadline for achieving that degree of effluent abatement.

The law in the case consists of three interdependent provisions of the Act which are at the crux of the regulatory scheme to control point sources of water pollution. Section 301 (b)[2] defines an inflexible schedule for achieving two interim levels of effluent abatement in furtherance of "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." Section 101 (a) (1). Key to this litigation is the subsection 301 (b) (1) (A) (i) requirement of conformity by July 1, 1977 with "effluent limitations for point sources * * * which shall require the application of the best practicable control technology currently available [BPT] as defined by the Administrator pursuant to section [304 (b)] of [the Act] * * *." Section 304 (b) (1),[3] in turn, obligates the Administrator to publish by October 18, 1973, regulations establishing effluent guidelines reflecting BPT for categories of dischargers including iron and steel manufacturing. See section 306 (b) (1) (A).[4]

Pollution control standards promulgated pursuant to sections 301 and 304 are implemented nationally through a decentralized permit granting mechanism defined in section 402[5] as the National Pollutant Discharge Elimination System (NPDES). Subsection 402 (a) (1) empowers EPA in the normal course to issue permits which impose industry-wide effluent limitations which it has already defined. In addition, EPA may define these limitations on a case by case basis "prior to the taking of necessary implementing actions relating to all such requirements" (i.e., while rule making is still in progress). *Id.*

2 33 U.S.C. Section 1311 (b).

3 33 U.S.C. Section 1314 (b) (1).

4 33 U.S.C. Section 1316 (b) (1) (A) lists the minimum industry categories of pollution sources for which regulations must be promulgated.

5 33 U.S.C. Section 1342.

Subsection 402 (b) directs the Administrator to delegate permit granting authority to states which have proposed self-regulatory programs which are operationally compatible with uniform administration of the Act. To ensure that qualifying state environmental agencies apply effluent limitations even-handedly, subsection 402 (d) (2) (B) empowers the Administrator to block issuance of any proposed NPDES permit which he deems to be "outside the guidelines and requirements of [the Act]." *Id.* Whether federal or state in origin, all NPDES permits must ensure compliance with "applicable requirements" of six enumerated provisions of the Act including section 301. In addition, all permits must issue on or before December 31, 1974, pursuant to subsection 402 (k).[6]

In July, 1972, Republic Steel Corporation (Republic) applied for a federal permit to continue discharging effluents from its Canton, Ohio Steel mill into Nimishillen Creek. The Canton mill is an integrated steel manufacturing operation engaged primarily in the processing of alloy and stainless steel. In March, 1974, Ohio received approval from EPA under section 402 (b) to begin issuing NPDES permits, and Republic immediately commenced to negotiate with the Ohio Environmental Protection Agency (Ohio EPA).

In June, 1974, Ohio EPA issued a draft permit[7] for the Canton mill which incorporated *state defined* effluent limitations under state estimates of BPT. The permit provided for a 24 month compliance schedule compatible with the Act's July 1, 1977 interim implementation deadline. At that time EPA had failed to promulgate any section 304 (b) effluent limitation guidelines for iron and steel manufacturing.[8] As of the present date no final regulations exist covering alloy and stainless steel operation.[9]

6 This deadline is not expressly mandated by the Act, but may be inferred from the fact that 33 U.S.C. Section 1342 (k) states that continuation of effluent discharge without a permit after December 31, 1974 will violate the Act unless a permit application is pending and disposition has been delayed for reasons other than the discharger's own negligence. *See Natural Resources Defense Council, Inc. v. Train,* 510 F.2d 692, 707 (D. C. Cir, 1975).

7 NPDES permit No. D 300*AD. *(8 and 9 contd. next page)*

Understandably, in the absence of controlling federal regulations, Republic sought to exploit available state administrative procedures to secure the most favorable permit terms and conditions. Prolonged hearings and negotiations with Ohio EPA resulted in redefinition of the originally proposed effluent limitations. On August 1, 1975, eight months after the last date envisioned by Congress for routine issuance of NPDES permits, final agreement was reached and the implementation period commenced to run. However, Republic continued to assert that full compliance within 24 months was physically impossible.[10] This prompted further adjudication hearings at which Republic presented unchallenged engineering and procurement data which convinced Ohio EPA to modify the permit to allow 42 months for development and installation of anti-pollution devices. Ohio EPA was aware that this change extended compliance beyond the July 1, 1977, date imposed by section 301 (b) (1) (A) (i). However, the state administrator believed that the special circumstances of the case legally justified this deviation.

In January, 1976, Ohio EPA transmitted the final NPDES permit to EPA's Region V office as required by section 402 (d) (1). Within 90 days the Director of the Enforcement Division of Region V objected to its issuance, exercising his authority under section 402 (d) (2) (B). He did not expressly question the reasonableness of the state's BPT effluent standards or the 42 month implementation schedule. Rather, he concluded that the permit violated section 301 because full

8 Regulations defining BPT effluent limitations for primary operations in carbon steel manufacturing were promulgated in 39 *Fed. Reg.* 24114 (June 28, 1974). However, these regulations were subsequently remanded in their entirety to the Administrator for revision in accordance with the decision in *American Iron and Steel Institute v. EPA,* 526 F. 2d 1027 (3rd Cir. 1975). As of the date of oral argument in the instant case, no revised regulations had been promulgated.

9 "Interim final" guidelines covering alloy and stainless steel operations were published in 41 *Fed. Reg.* 12990 (March 29, 1976).

10 Had Republic's permit been issued before the statutory deadline mandated by 33 U.S.C. Section 1342 (k), the company would have had 30 months to achieve BPT effluent levels.

compliance would not be achieved until after July 1, 1977. Republic filed a timely petition for judicial review, pursuant to section 509 (b) (1) (F),[11] challenging this determination.

We do not question EPA's good faith in attempting to discharge the ambitious and often ambiguous duties imposed upon it by a "poorly drafted and astonishingly imprecise statute." *E.I. du Pont de Nemours & Company v. Train,* 541 F.2d 1018, 1026 (4th Cir. 1976). Many factors, some admittedly beyond EPA's control, have conspired to frustrate its legitimate compliance efforts. In particular, virtually every exercise of the agency's discretion has precipitated protracted litigation challenging the legitimacy of its authority or the substance of its "final" regulations. *See American Petroleum Institute v. Environmental Protection Agency,* 540 F.2d 1023, 1027 (10th Cir. 1976) (thirteen relevant cases cited).

The fact remains, however, that the imperative nature of EPA's rule making responsibilities under the Act has been confirmed through litigation. In 1975, the United States Court of Appeals for the District of Columbia affirmed the authority of a federal district court to compel the agency to adhere to a remedial court imposed timetable for the publication of guidelines for all point source effluent discharges. *Natural Resources Defense Council, Inc. v. Train,* 510 F. 2d 692 (D.C. Cir. 1975). Unfortunately, judicial intervention did not avert the regrettable situation which confronts us here. The inability of EPA to meet its statutory obligations has distorted the regulatory scheme and imposed additional burdens which must be equitably distributed. This task is a difficult one because of the nature of the available options. Either the affected discharger must be compelled to risk potential enforcement proceedings in spite of an abbreviated compliance schedule, or society must tolerate slippage of an interim pollution abatement deadline.

Republic contends that the language of section 301 (b) (1) (A) (i) expressly conditions adherence to the July 1, 1977, deadline upon definition *by the Administrator* of BPT effluent limitations and guidelines *pursuant to section 304 (b) of the Act.* Therefore, the Administrator's failure to satisfy this condition precedent by publishing final regulations for alloy and stainless steel manufacturing excuses Republic's noncompliance with the July 1 date. We reluctantly agree. The import of the

11 33 U.S.C. Section 1369 (b) (1) (F).

section is unequivocal: federal regulations must exist before dischargers can be compelled to honor dates for implementing them. *See United States v. GAF Corporation,* 389 F. Supp. 1379, 1386 (S.D. Tex. 1975). The presence within the Act of successive deadlines for promulgation of standards, issuance of permits, and conformance with effluent limitations bespeaks a rational implementation strategy anticipating a discrete sequence of events:

> The Act's text and its legislative history make clear that as a general matter the section 304 (b) (1) guidelines and the section 301 (b) (1) limitations were to be developed prior to the issuance of permits. Sections 402 (a) and 402 (b) require that permits issued by the Administrator and by the states assure compliance with the effluent limitations of section 301. The Senate Report confirms the interdependence of the three provisions. That report states that "[s]ubsection (b) of this section [304] requires the Administrator, within one year after enactment, to publish guidelines for setting effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under section 402." Another portion of the Senate Report indicates that at least 30 months lead time is required to afford industries an opportunity to complete construction and modifications necessary to comply with the phase one effluent limitation deadline. Under the final version of the Act, effluent limitations and permits would be required by December 31, 1974, in order to provide polluters 30 months to comply with the July 1, 1977, deadline.

Natural Resources Defense Council, Inc. v. Train, 510 F. 2d 692, 707-708 (D.C. Cir. 1975) (footnotes omitted).

The crucial role of federal rule making in achieving meaningful pollution control on a national scale is revealed by the Third Circuit's analysis in *American Iron and Steel Institute v. EPA:*

> [W]e reconcile sections 301 and 304 in the following manner: the section 301 limitations represent both the base level or minimum degree of effluent *control* permissible and the ceiling (or maximum amount of effluent discharge) permissible nationwide within a given category, and the section 304 guidelines are intended to provide precise guidance to the permit-issuing authorities in establishing a permissible level of discharge that is *more stringent than the ceiling.*

526 F. 2d, 1027, 1045 (3rd Cir. 1975). (emphasis added). If no federal standards exist, *any* state limitations on discharge, no matter how insignificant, become more stringent than nonexistent ceilings imposed by the Act. *See* section 301 (b) (1) (C). Surely Congress did not intend for the Act to be construed to foster token, *ad hoc,* clean up efforts which would inevitably defeat achievement of the goal of zero pollution by 1985.[12]

EPA answers Republic's argument by exhorting us to accept the "plain meaning" of section 301 (b) (1) (A). The agency contends that the language of the section admits to no other interpretation than that July 1, 1977 is to be a "uniform deadline on all industrial dischargers, * * * plain, unequivocal and mandatory." Unfortunately, EPA's argument is persuasive only if we accept an expurgated version of the section which omits reference to the duty owed by the Administrator to publish regulations by a fixed date.

12 The Director of Ohio EPA, a respondent in the case whose position is aligned with that of Republic, argues that he issued Republic's NPDES permit under the authority of 33 U.S.C. Section 1311 (b) (1) (C) which allows states to impose more stringent limitations than those applicable under the Act. If we follow this strained rationale, we would have to approve any state permit which authorized dischargers to maintain current effluent levels because *any* standard is more stringent than a nonexistent federal ceiling. This we refuse to do because it would be inimical to achieving meaningful pollution abatement on a national scale.

EPA correctly points out that the Act is devoid of language countenancing exceptions to the July 1, 1977, deadline under any condition. The Act's legislative history is replete with statements attesting to the inflexible nature of the administrative timetable.[13] In addition, Congress rejected a provision in the House version of the measure which would have allowed dischargers a discretionary extension of time in the face of impending noncompliance due to physical or legal impossibility.[14] Nevertheless, nothing cited to us by EPA suggests that Congress anticipated the "Catch 22" situation inherent in the facts of this case. The language of the Act and its legislative history make clear that Congress expected EPA to define the rules before subjecting dischargers to potential civil and criminal penalties. *Natural Resources Defense Council, Inc. v. Train, supra.*

EPA attempts to bolster its position by emphasizing its authority under section 402 (a) (1), in advance of formally promulgated regulations, to issue and enforce NPDES permits imposing "such conditions as the Administrator determines are necessary to carry out the provisions of the Act." *Id.* From this, it would have us conclude that the duty of the discharger to achieve BPT by July 1, 1977 must be independent of EPA's obligation to promulgate the necessary guidelines by October 18, 1973, EPA cites *Bethlehem Steel Corporation v. Train,* 544 F. 2d 657 (3rd Cir. 1976), and *United States v. Cutter Laboratories, Inc.,* 413 F. Supp. 1295 (E.D. Tenn. 1976), in support of this position.[15]

13 For a comprehensive review of this legislative history, see *Bethlehem Steel Corporation v. Train,* 544 F. 2d 657, 661-662 (3rd Cir. 1976).

14 See proposed section 301 (b) (3), *A Legislative History of the Water Polution Control Act Amendents of 1972,* 93rd Cong. 965 (Jan. 1973).

15 EPA also draws our attention to *State Water Control Board v. Train,* 8 E.R.C. 1609 (E.D. Va., 1976) which upheld the inflexibility of a different section 301 deadline where noncompliance was due to the failure of Congress to appropriate sufficient money for public works (in this case, the construction of municipal sewage treatment plants). This case is readily distinguished from the present situation where noncompliance is linked to derelection by EPA of duties imposed by the Act itself as a condition precedent to compliance.

A careful reading of both opinions confirms that EPA's reliance upon them is misplaced. The Third Circuit correctly categorizes EPA's authority under section 402 (a) (1) to issue NPDES permits on a case by case basis as a *temporary* expedient to ensure immediate progress during the year of rule making contemplated by section 402 (b):

> As a result [of the nonexistence of section 304 and 301 guidelines and limitations for iron and steel manufacturing as of the date of the opinion], permits have been issued to iron and steel manufacturers under a clause of section 402 (a) (1) that empowers the EPA to grant permits, *on an interim basis,* before formal guidelines are promulgated.

Bethlehem Steel Corporation v. Train, 544 F. 2d at 659 (emphasis added). In the *Bethlehem Steel* case EPA granted the permit on December 31, 1974, the last day mandated by Congress for routine issuance of NPDES permits. Therefore, Bethlehem Steel enjoyed a 30 month compliance schedule, the minimum period possible under the statutory scheme assuming no administrative slippage. In contrast, Republic's permit was issued by a state agency eight months after expiration of the permit granting deadline, affording Republic only 24 months for compliance. This factual difference was not overlooked by the Third Circuit which carefully excludes Republic's situation from the purview of its holding in the *Bethlehem Steel* case.[16]

We read the *Bethlehem Steel* and *Cutter Laboratory* decisions as standing for the limited proposition that a July 1, 1977, deadline, written into an NPDES permit *issued by EPA on or before December 31, 1974,* is enforceable despite the absence of BPT federal guidelines. Although we may share

16 *See* 544 F. 2d at 660 n. 20. Republic appeared as *amicus curiae* in that case on behalf of Bethlehem Steel. *United States Steel Corporation v. Train,* Nos. 76-1425 and 76-1616 (7th Cir. May 13, 1977), a case in which EPA issued the NPDES permit in October, 1974, while federal BPT standards existed for iron and carbon steel manufacturing, is distinguishable from our decision here on the same ground.

this view, we find no persuasive authority for extending its application to permits issued by EPA after 1974.[17] In addition, we are convinced that the Act expressly forecloses this result when the permit issuing authority is a state agency. Section 402 (1) (A) empowers states to issue NPDES permits which "apply, and insure compliance with, any applicable requirements of sections 301, * * * of [the Act]." *Id.* Our holding that section 301 (b) (1) (A) (i) is made unenforceable by the Administrator's failure to promulgate necessary regulations is tantamount to a finding that the July 1, 1977, deadline is no longer an "applicable requirement" of the Act. Therefore, in this case, Ohio EPA was not bound to apply it and EPA was without authority to object to the proposed permit on this ground.[18]

EPA's final contention is that it complied with the rule making requirements of section 304 (b) by implicitly ratifying the effluent limitations defined by Ohio EPA. EPA ignores the actual language of section 301 (b) (1) (A) (i) which demands that BPT guidelines be promulgated pursuant to the procedure set forth in section 304 (b). Ohio EPA did not follow that procedure for the obvious reason that section 304 (b) is exclusively addressed to the Administrator of EPA. We reject the notion that state acts can be federalized *sub silentio* by the mere acquiescence of an administrative agency in the absence of clear statutory provisions to that effect.

17 The difficulty is dramatized by a hypothetical case in which EPA issues an NPDES permit in 1977 requiring compliance with the July 1, 1977 completion date. Under such circumstances compliance may well be foreclosed by constitutional objections. *See United States Steel Corporation v. Train,* Nos. 76-1425 and 76-1616, at 51 (7th Cir. May 13, 1977).

18 We expressly exclude from our holding situations in which state agencies may have issued NPDES permits in the absence of federal guidelines prior to December 31, 1974.

Republic urges us to remand the case to EPA with directions that the agency unconditionally approve immediate issuance of Republic's NPDES permit in its original form. However, the record suggests a more appropriate remedy. If we assume that the Administrator satisfactorily performed all the tasks incumbent upon him under sections 301 and 304, Republic could not have received its permit any earlier than September 1, 1974.[19] This would have afforded no more than 34 months to achieve final BPT effluent limitations. The actual permit provides 42 months, eight more than Republic would have been entitled to had there been no distortion of the Act's timetable. Our disposition of this case is intended to relieve the discharger of the unfair consequences flowing from EPA's administrative shortcomings. It is not intended to bestow special benefits not enjoyed by other permittees.

EPA is not foreclosed from objecting to Republic's permit on grounds other than the termination date of its compliance schedule. Under the special circumstances of this case, we believe that EPA must be granted a second opportunity to scrutinize the balance of the permit for consistency with the Act.[20] Perhaps the inherent reasonableness of the proposed 42 month period is amenable to administrative review under existing regulations or sections other than 301. That is for EPA to determine in the first instance.

To guard against the possibility that situations such as this will prompt state agencies to propose extravagant compliance schedules, we remand the case to EPA with directions that the agency acquiesce to issuance by Ohio EPA of Republic's NPDES permit unless, within 30 days, it specifies persuasive new grounds for objection under section 402 (d) (2) (B).

Remanded.

19 This date approximately reflects the date upon which Republic's permit was first issued by Ohio EPA (prior to extensive renegotiations and modification of terms) plus the maximum period reserved for the filing of objections by EPA.

20 The obviousness of the permit's putative section 301 violation may have prompted EPA to bypass an exhaustive review of its other substantive provisons.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 76-1557

[Filed June 23, 1977]

Republic Steel Corporation, *Petitioner*

v.

Russell E. Train, Administrator, United States Environmental Protection Agency,

George R. Alexander, Jr. Regional Administrator, United States Environmental Protection Agency,

and

Ned E. Williams, Director, Ohio Environmental Protection Agency, *Respondents*

Before: Celebrezze and Lively, Circuit Judges, and Rubin, District Judge.

On petition to review an action of the Administrator of the United States Environmental Protection Agency,

This cause came on to be heard on the brief and record of proceedings before the Environmental Protection Agency and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the case be and it is hereby remanded to the Environmental Protection Agency with directions.

Each party will bear its own costs on this appeal.

Entered by Order of the Court.

/s/ John P. Hehman
Clerk

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 16, 1978

E. Dennis Muchnicki, Esq.
Assistant Attorney General of Ohio
30 East Broad Street, 17th Floor
Columbus, OH 43215

RE: Douglas M. Costle, Administrator, Environmental Protection Agency, et al. v. Republic Steel Corporation, et al. No. 77-631

Dear Mr. Muchnicki:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Public Law 95-217.

Very truly yours,

MICHAEL RODAK, JR., Clerk

APPENDIX F

Mr. Ned Williams, Director
Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, Ohio 43216

RE: Republic Steel Corporation
Canton, Ohio Facility
OEPA Permit No. D 300*AD

Dear Mr. Williams:

On January 5, 1976, the Ohio Environmental Protection Agency (OEPA) submitted for United States Environmental Protection Agency (USEPA) consideration pursuant to g402(d) of the Federal Water Pollution Control Act, as amended, (FWPCA) and the OEPA - USEPA Memorandum of Agreement, a stipulation and proposed permit for the referenced facility. The transmittal letter noted that the schedule of compliance for BPT effluent limitations in this permit extended beyond July 1, 1977. A 45-day period was specified for this Agency's response. Subsequently, the response time was entended to April 1, 1976 by mutual agreement of our respective agencies.

Because of the legal and policy implications involved in extending the statutory requirement for achievement of BPT by July 1, 1977, (Section 301 of the FWPCA), Region V asked USEPA Headquarters for review and comment. The recommendation of the Deputy Assistant Administrator for Water Enforcement is attached to this letter.

We have also engaged in numerous extended discussions of this permit and the problems it poses, most recently a conference call on March 29, 1976, among Region V staff, a representative of the Ohio Attorney-General, and counsel and others for Republic Steel Corporation.

Based on the record presented, the transcript of proceedings, the proposed NPDES permit, and the Stipulation of the parties, Region V, USEPA, hereby makes the following findings:

1. Permit No. D 300*AD was issued to Republic Steel Corporation for its Canton, Ohio facility on June 10, 1974. Final effluent guidelines for the Iron & Steel Industry had not been promulgated as of the date of permit issuance.

2. The final effluent limitations specified in the proposed permit represent BPT as stipulated by the OEPA and Republic in the absence of promulgated guidelines. By letter of February 24, 1976 from A. H. Manzardo to Ned Williams, Region V concurred in the appropriateness of the final limitations.

3. An adjudicatory hearing was held to consider the Schedule of Compliance for achieving the final limitations specified in the permit.

4. As a result of said hearing, it was stipulated by the parties (OEPA and Republic Steel) that the Schedule of Compliance specified in the proposed permit is reasonable for achieving the final limitations in the permit.

5. The reasonableness of the Schedule of Compliance is not questioned by USEPA.

6. The FWPCA mandates compliance with BPT no later than July 1, 1977.

7. The Schedule of Compliance runs for 41 months and would result in achievement of BPT subsequent to July 1, 1977.

8. The Administrator of the USEPA, in NPDES Appeal No. 75-9, Bethlehem Steel Corporation, dated September 30, 1975, and the USEPA General Counsel in Decision No. 26, Bethlehem Steel Corporation, dated July 24, 1975 have held that compliance with BPT limitations must be achieved no later than July 1, 1977.

Based upon the foregoing findings, Region V, USEPA, has determined that the stipulation and proposed permit for Republic Steel Corporation, Canton, Ohio facility, would violate Section 301 of the FWPCA in that the Schedule of Compliance for BPT extends beyond July 1, 1977, and for that reason, Region V, USEPA, objects to the issuance of said permit. If the proposed permit can be revised to conform with the requirements of the FWPCA, this objection will be withdrawn.

Very truly yours,

James O. McDonald, Director
Enforcement Division

Attachment

cc: Mr. John Daniel
Office of the Attorney General
State of Ohio

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

February 25, 1976

OFFICE OF ENFORCEMENT

Memorandum

TO: Director, Enforcement Division, Region V

FROM: Deputy Assistant Administrator for Water Enforcement

SUBJECT: Republic Steel Corporation Canton, Ohio Stipulation and Proposed NPDES Permit

This is in response to your letter of January 22, 1976, regarding the Ohio EPA proceedings on the above-identified permit.

We have reviewed the Ohio EPA letter to your office dated January 5, 1976, the "Stipulation" between the State of Ohio and Republic Steel bearing a filing date of January 2, 1976, the proposed OEPA permit, No. D 300 *AD, bearing a filing date of January 2, 1976, and the transcript of proceedings in the Ohio adjudicatory hearing.

In our opinion, U.S. EPA must object to the schedule of compliance in the proposed Ohio permit on the ground that it is outside the requirements of section 301 of the Federal Water Pollution Control Act.

Jeffrey G. Miller

APPENDIX G

RELEVANT PROVISIONS OF THE CLEAN WATER ACT OF 1977

Section 301 (a) and (b)

SEC. 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this Act there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304 (b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304 (d) (1) of this Act; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to any State law or regulations, (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

(2) (A) [not later than July 1, 1983] *for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph,* effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology

economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304 (b) (2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304 (b) (2) of this Act or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act; [and]

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 201 (g) (2) (A) of this Act[.];

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitation in accordance with subparagraph (A) of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304 (a) (4) of this Act shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304 (b) (4) of this Act; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance

with effluent limitations in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

Section 304 (b)

(b) For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b) (1) of section 301 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b) (2) of section 301 of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories of classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; [and]

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants[.]; *and*

(4) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best conventional pollutant control technology (including measures and practices) for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best conventional pollutant control technology measures and practices to comply with section 301 (b) (2) (E) of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved. the process employed, the engineering

aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

Section 309

SEC. 309. (a) (1) whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 301, 302, 306, 307, [or] 308, *318, or 405* of this Act in a permit issued by a State under an approved permit program under section 402 *or 404* of this Act, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), *except where an extension has been granted under paragraph (5) (B) of this subsection,* the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, [or] 308, *318, or 405* of this Act, or is in violation of any permit condition or limitation implementing any

of such sections in a permit issued under section 402 of this Act by him or by a State *or in a permit issued under section 404 of this Act by a State*, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. [Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.] In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 308 of this Act shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5) (A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this Act or in any permit issued under this Act, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 402 of this Act was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension

of the date referred to in section 301 (b) (1) (A) to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 301 (b) (1) (A) or (C) of this Act, (B) that such person cannot meet the requirements for a time extension under section 301 (i) (2) of this Act, and (C) that the most expeditious and appropriate means of compliance with this Act by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this Act at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) (1) Any person who willfully or negligently violates section 301, 302, 306, 307, or 308 of this Act, or any permit condition or limitation implementing any of such actions in a permit issued under section 402 of this Act by the Administrator or by a State, *or in a permit issued under section 404 of this Act by a State*, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished

PAGINATION IS INCORRECT,

BUT TEXT IS COMPLETE.

by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 502 (5) of this Act, any responsible corporate officer.

(d) Any person who violates section 301, 302, 306, 307, [or] 308, *318 or 405* of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State, *or in a permit issued under section 404 of this Act by a State*, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

(c) Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Whenever, on the basis of an information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 307, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this Act. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this Act.

Section 402 (a) - (k)

SEC. 402. (a) (1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301 (a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899, after the date of enactment of this title. Each application for a permit under section 13 of the Act of March 3, 1899, pending on the date of enactment of this Act shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304 (h) (2) of this Act, or the date of approval by the Administrator of a permit program

for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

(b) At any time after the promulgation of the guidelines required by subsection (h) (2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for

a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require *the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307 (b) of this Act into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to* adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204 (b), 307, and 308.

(c) (1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304 [(h)] *(i)* (2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304 (h) (2) of this Act.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(d) (1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b) (5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act. *Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.*

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after the date of enactment of this paragraph, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act.

(e) In accordance with guidelines promulgated pursuant to subsection (h) (2) of section 304 of this Act, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the Department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved *or where the Administrator determines pursuant to section 309 (a) of this Act that a State with an approved program has not commenced appropriate enforcement action with respect to such permit,* may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source

not utilizing such treatment works prior to the finding that such condition was violated.

(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act.

(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

Section 505

SEC. 505. (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order

issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309 (d) of this Act.

(b) No action may be commenced—

(1) under subsection (a) (1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a) (2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator.

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307 (a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) (1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The

court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(c) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term "effluent standard or limitation under this Act" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard or performance under section 306 of this Act; (3) prohibition, effluent standard or pretreatment standards under section 307 of this Act: (5) certification under section 401 of this Act; or (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act).

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

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No. 78-820

In the Supreme Court of the United States

OCTOBER TERM, 1978

REPUBLIC STEEL CORPORATION, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (*"Republic Steel II"*) is reported at 581 F.2d 1228. The initial opinion of the court of appeals (*"Republic Steel I"*) is reported at 557 F.2d 91.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1978. The petition for a writ of certiorari was filed on November 17, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Water Pollution Control Act Amendments of 1972, as amended by the Clean Water Act of 1977, authorize the Administrator of the Environmental Protection Agency to disapprove state-issued National Pollutant Discharge Elimination System ("NPDES") permits that do not require the achievement, by July 1, 1977, of effluent limitations requiring the application of the best practicable control technology currently available.

STATEMENT

1. The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.*, establish the "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985" (33 U.S.C. 1251(a)(1)). Congress sought to achieve that goal in several stages. By July 1, 1977, polluters were required to achieve levels of discharge consistent with "the best practicable control technology currently available" (Section 301(b)(1)(A)), and by July 1, 1983 (now July 1, 1984), they must reach levels consistent with "the best available technology economically achievable" (Section 301(b)(2)(A)). See *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 121 (1977); *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204 n.11 (1976). The accomplishment of these successive levels of pollution control is insured through a system of permits for individual sources of pollution.

The permit system is established by Section 402 of the statute. No person may discharge any pollutant after December 31, 1974, without a permit (Sections 301(a) and 402(k)), and no permit may be issued that does not require the achievement of levels of effluent consistent with the best practicable control technology by July 1, 1977 (Section 402(a)(1) and Section 301(b)(1)(A)). The permits may be issued by the Administrator of the Environmental Protection Agency or by states that have instituted permit programs approved by the Agency (Section 402(b)). The Administrator may disapprove state-issued permits that are "outside the guidelines and requirements" of the statute (Section 402(d)(2)).

Although the Act authorizes the issuance of permits with conditions specified on a case-by-case basis (Section 402(a)(1)), Congress required the Administrator to promulgate nationwide "regulations, providing guidelines for effluent limitations," for each industry by October 18, 1973 (Section 304(b)). These guidelines are to specify, *inter alia*, the "[f]actors relating to the assessment of best practicable control technology currently available" (Section 304(b)(1)(B)).

But "[t]he various deadlines imposed on the Administrator were too ambitious for him to meet." *E. I. du Pont de Nemours & Co.* v. *Train*, *supra*, 430 U.S. at 122. The Administrator was unable to promulgate guidelines for the hundreds of industries within the time fixed by Congress. See generally *Natural Resources Defense Council, Inc.* v. *Train*,

510 F.2d 692 (D.C.Cir. 1975). Of particular relevance in this case, the Administrator did not promulgate guidelines for primary operations in the carbon steel industry until June 28, 1974 (39 Fed. Reg. 24114), and even then a court of appeals held that the guidelines were defective in part. *American Iron and Steel Institute* v. *EPA*, 526 F.2d 1027 (3d Cir. 1975).[1] Similarly, the Agency published regulations for alloy and stainless steel operations only on March 29, 1976 (41 Fed. Reg. 12990), and, while the technological choices were sustained in their entirety, the regulations were invalidated for lack of sufficient notice. *American Iron and Steel Institute* v. *EPA*, 568 F.2d 284 (3d Cir. 1977).

2. In July 1972, petitioner applied for a permit to discharge pollutants into navigable waters from its mill in Canton, Ohio. This application was pending in March 1974, when the Environmental Protection Agency approved Ohio's permit program. The Agency consequently transferred petitioner's application to the Ohio Environmental Protection Agency ("Ohio") (Pet. App. 16a).

Ohio issued a draft permit to petitioner on June 10, 1974 (Pet. App. 17a). The draft permit required compliance by June 1976 with Ohio's assessment of the volume of discharge consistent with best practica-

[1] On August 10, 1977, the court of appeals recalled its mandate in part, concluding that its invalidation of the form of the regulations was erroneous in light of this Court's subsequent decision in *du Pont. American Iron and Steel Institute* v. *EPA*, 560 F.2d 589 (3d Cir. 1977).

ble technology. Petitioner, seeking more favorable permit conditions, initiated prolonged negotiations with the state agency (*ibid.*). On August 1, 1975, petitioner and Ohio agreed on discharge levels less stringent than those established in the draft permit. Furthermore, after additional administrative proceedings, Ohio extended the compliance schedule to give petitioner until February 1, 1979, within which to achieve the level of control required by the permit (Pet. App. 18a).

In January 1976, Ohio transmitted this permit to the Agency for approval. The Agency refused to approve the permit on March 30, 1976 (Pet. App. 28a-31a). While the Agency did not dispute Ohio's assessment of the level of effluent that would be consistent with the best practicable control technology, it concluded that the February 1, 1979, compliance deadline set by the state permit did not satisfy the July 1, 1977, deadline established by Section 301(b)(1)(A) of the Act.

3. Petitioner sought review of the Agency's decision in the court of appeals. The court concluded that the issuance of guidelines under Section 304(b) to define the best practicable technology for each industry is a condition precedent to application of the July 1, 1977, compliance deadline specified in Section 301(b)(1)(A) of the Act. *Republic Steel I* (Pet. App. 14a-26a). Although the court acknowledged that the statutory deadline is inflexible on its face and that the "legislative history is replete with statements attesting to the inflexible nature of

the administrative timetable" (*id.* at 21a), it nevertheless concluded that Congress had not contemplated that compliance with effluent limitations would precede issuance of nationwide guidelines. The court thus held "that section 301(b)(1)(A)(i) is made unenforceable by the Administrator's failure to promulgate necessary regulations * * * [and] that the July 1, 1977, deadline is no longer an 'applicable requirement' of the Act" (*id.* at 24a).

4. The Environmental Protection Agency petitioned for a writ of certiorari to review the decision in *Republic Steel I. Costle* v. *Republic Steel Corp.*, No. 77-631. On December 27, 1977, while the Agency's petition was pending, Congress passed the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, which amended the 1972 Act in several respects. The new legislation recognized that the July 1, 1977, best practicable technology deadline is inflexible (see Pet. App. 4a), but it gave the Administrator discretion to extend the deadline in particular cases under Section 309 of the Act. On January 16, 1978, this Court granted the petition and summarily vacated and remanded the case to the court of appeals "for further consideration in light of Public Law 95-217." 434 U.S. 1030.

5. On remand, the court of appeals upheld EPA's disapproval of the permit and dismissed Republic's petition for review. *Republic Steel II* (Pet. App. 1a-12a). In light of the 1977 amendments, the court held that "[t]he import of the statute is now plain: the July 1, 1977, deadline cannot be waived by the courts. To the extent that noncompliance occurs despite good faith efforts as defined in [new] § 309(a)(5)(B), relief is available only via discretionary extension of the deadline by the Administrator" (*id.* at 5a-6a).

ARGUMENT

The decision of the court of appeals is correct and presents no issue warranting review by this Court.

1. The Federal Water Pollution Control Act Amendments of 1972 established a multi-stage program for achieving the national goal of eliminating water pollution by 1985. The first major stage—limitation of effluents to those consistent with "the best practicable control technology currently available" ("BPT")—was to be achieved by July 1, 1977 (Section 301(b)(1)(A)). The language and legislative history of the Act support the court of appeals' conclusion that the 1977 deadline is inflexible and may not be extended in NPDES permits.[2]

Petitioner's principal contention (Pet. 9-11)—that the duty to limit effluents consistently with the best practicable technology by July 1, 1977, was conditioned on the Administrator's timely promulgation of guidelines defining the best practicable technology (Section 304(b)(1)(B))—is based upon a misunderstanding of the role of the guidelines in the statutory plan. The Act does not require compliance with the guidelines by July 1, 1977, or any other date;

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[2] See, *e.g.*, U.S. Library of Congress, Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 162, 231, 1461 and 1691 (Comm. Print 1973).

it requires that polluters achieve by that date a level of discharges consistent with application of the best practicable technology. The guidelines assist the permit issuers in implementing the statutory requirement, but the requirement itself exists independently of the guidelines.[3]

Congress provided in Section 402(a)(1) that permits could be issued and conditions specified on a case-by-case basis prior to the promulgation of guidelines. See *United States Steel Corporation* v. *Train*, 556 F.2d 822, 844, 854 (7th Cir. 1977). Thus, whether or not guidelines for a particular industry have been promulgated, where, as here, a permit is issued on a case-by-case determination of best practicable control technology, that technology level must be achieved by July 1, 1977. *Bethlehem Steel Corporation* v. *Train*, 544 F.2d 657 (3d Cir. 1976), cert. denied, 430 U.S. 975 (1977); *United States Steel Corporation* v. *Train*, *supra*. The court of appeals was therefore correct in concluding that "the July 1, 1977, deadline cannot be waived by the courts" (Pet. App. 5a). Cf. *Union Electric Company* v. *EPA*, 427 U.S. 246, 269 (1976); *State Water Control Board* v. *Train*, 559 F.2d 921 (4th Cir. 1977).[4]

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[3] See, *e.g.*, *Natural Resources Defense Council, Inc.* v. *Train*, *supra*, 510 F.2d at 710-711 ("[t]he statutory framework is not so tightly drawn as to require guidelines for each and every class and category of point source * * *").

[4] We discussed this issue at somewhat greater length in our petition in *Costle* v. *Republic Steel Corp.*, No. 77-631, *cert. granted and judgment vacated*, 434 U.S. 1030 (1978). Petitioner's inability to meet the July 1, 1977, best practicable technology deadline is the rare exception rather than the rule. Despite the absence of timely promulgated guidelines under Section 304 for most major industrial categories, approximately 90% of major industrial dischargers were able to meet the 1977 deadline. See S. Rep. No. 95-370, 95th Cong., 1st Sess. 62 (1977).

2. The Clean Water Act of 1977, Pub. L. No. 95-217, reinforces this conclusion. In enacting this legislation, Congress shared with the Administrator and the court of appeals the concern that instances might arise in which the July 1, 1977, deadline would work hardship on some dischargers unable to comply with the Act despite good faith efforts. The appropriate remedy for this situation was a major topic in the congressional debates.

On April 5, 1977, the House of Representatives passed H.R. 3199, amending the Federal Water Pollution Control Act Amendments of 1972. Section 13 of that bill would have amended Section 301 of the 1972 Act to allow case-by-case extensions of the July 1, 1977, deadline in NPDES permits for industrial and municipal dischargers. H.R. Rep. No. 95-139, 95th Cong., 1st Sess. 15, 41 (1977); see also 123 Cong. Rec. H3026-H3030 (daily ed. Apr. 5, 1977). Four months later, the Senate also approved amendments to the Act when it adopted S. 1952. See 123 Cong. Rec. S13534-S13629 (daily ed. Aug. 4, 1977). While the Senate agreed with allowing deadline extensions in NPDES permits for municipalities, it rejected this approach for industrial polluters. Instead, the Senate bill authorized the Administrator,

as the person primarily responsible for enforcement of the Act, to issue orders under Section 309 to extend the industrial compliance deadlines in limited circumstances. See S. Rep. No. 95-370, 95th Cong., 1st Sess. 62 (1977); 123 Cong. Rec. S13538, S13552 (daily ed. Aug. 4, 1977).

The Senate approach eventually prevailed in the final legislation. See H.R. Rep. No. 95-830, 95th Cong., 1st Sess. 75-78, 88-90 (1977). The Clean Water Act of 1977 amended Section 301 to allow case-by-case extensions of the deadline in NPDES permits for municipalities and added Section 309(a)(5)(B) to authorize the Administrator to issue discretionary orders in limited circumstances to extend the deadline for industrial polluters until April 1, 1979.[5]

If, as petitioner argues, the 1972 Act authorized extensions of the best practicable technology deadline in NPDES permits, this legislative activity would have been unnecessary. However, the 1972 Act and the Clean Water Act of 1977 must be read together "as part[] of an integrated whole" (*Markham* v. *Cabell*, 326 U.S. 404, 411 (1945)) and must be given "the most harmonious, comprehensive meaning possible." *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480,

[5] The text of Section 309(a)(5)(B) is set out at Pet. App. 40a. This provision is essentially a codification of an enforcement policy developed by the Agency in 1976. See S. Rep. No. 95-370, *supra*, at 60-61; 123 Cong. Rec. S13552 (daily ed. Aug. 4, 1977); 123 Cong. Rec. S19650 (daily ed. Dec. 15, 1977).

488 (1947). Acceptance of petitioner's view, as the court of appeals noted, "would not only render § 309(a)(5)(B) largely meaningless, but also would defeat Congress' clearly expressed intent in enacting that section" (Pet. App. 6a). The court below was thus correct in holding that the Section 301 implementation deadline could not be extended in petitioner's permit and that Section 309(a)(5)(B) provides the sole avenue of relief.[6]

3. Petitioner contends (Pet. 12-14) that the court of appeals erred in giving "retroactive" effect to the 1977 amendments to the Act. This claim is insubstantial.

In the first place, the 1977 amendments do not alter the preexisting requirement that dischargers meet the July 1, 1977, deadline and thus do not impose any new obligations. As the Senate Report on the 1977 amendments stated (S. Rep. No. 95-370, *supra*, at 60):

[6] Petitioner contends (Pet. 11-12) that a Section 309(a)(5)(B) order is discretionary and, even if issued, would not provide the same relief as an extension of the July 1, 1977, deadline in its permit. Contrary to petitioner's speculation, we doubt that a discharger would be subject to judicially imposed penalties if the Administrator were to grant it relief under Section 309(a)(5)(B). See *State Water Control Board* v. *Train*, *supra*, 559 F.2d at 927-928. In any event, petitioner's dissatisfaction with Section 309(a)(5)(B) is not a controlling consideration. Congress concluded that "[t]his amendment responds to the legitimate concern of dischargers who, despite good faith efforts, will not comply with the 1977 requirements." S. Rep. No. 95-370, *supra*, at 60.

> Under existing law there are no circumstances that justify a time for compliance extending beyond July 1, 1977 * * *. Thus, the decision of the U.S. Court of Appeals for the Sixth Circuit in [*Republic Steel I*] was an incorrect interpretation of existing law.

The 1977 legislation is persuasive evidence of the congressional intent in adopting the complex provisions of the 1972 Federal Water Pollution Control Act Amendments. See *NLRB* v. *Bell Aerospace Company*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Company, Inc.* v. *FCC*, 395 U.S. 367, 381 (1969). Congress clearly intended Section 301 to establish an inflexible July 1, 1977, compliance deadline for all dischargers subject to the Act.

Apart from the light it shed on the 1972 Act, the Clean Water Act of 1977 was the law to be applied to petitioner's case. The court of appeals properly looked to the law in effect at the time of its decision in the absence of any "manifest injustice" or inconsistent statutory directive (Pet. App. 8a-11a). See *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974). Petitioner cannot claim that it lacked fair warning of the mandatory July 1, 1977, deadline. Prior to the *Republic Steel I* decision on June 23, 1977, the Agency had consistently taken the position that compliance with the July 1, 1977, deadline in discharge permits was mandatory (Pet. App. 10a). Moreover, as the court of appeals observed (*id.* at 11a; footnote omitted):

> In any event, Republic does not seriously claim that its noncompliance with the July 1, 1977, deadline is the result of an honest belief that the deadline was invalid. Rather the company maintains that it was unable to meet the deadline, despite good faith efforts, because of the absence of [best practicable technology] guidelines from EPA. If this is true, then the new § 309(a)(5)(B) procedure can provide any justified relief.

4. Finally, there is no conflict among the circuits requiring resolution by this Court. The decision below is consistent with rulings in the other courts of appeals. See *Bethlehem Steel Corporation* v. *Train*, *supra*; *United States Steel Corporation* v. *Train*, *supra*. Cf. *State Water Control Board* v. *Train*, *supra*. While the Ninth Circuit reached a contrary conclusion in *Washington* v. *EPA*, 573 F.2d 583 (9th Cir. 1978), that court, as the court below noted (Pet. App. 7a), failed to consider the impact of the Clean Water Act of 1977. Absent a conflicting construction of the Act as affected by the 1977 amendments, there is no need for this Court to consider the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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